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July 7, 2003

VIA HAND DELIVERY
Mr. Vernon Williams, Secretary
Office the Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, D.C. 20423-0001

RE: Finance Docket 34192, Hi Tech Trans, LLC - - Petition for Declaratory Order - - Hudson County, NJ 208298-

Finance Docket No. 34192 (Sub-No. 1), Hi Tech Trans LLC - - Petition for Declaratory Order - - Rail Transload Facility at Oak Island Yard, Newark, NJ 208297-

Dear Secretary Williams:

In accordance to the provisions of 49 C.F.R. § 1104.3, we have enclosed an original and 10 copies of the Reply of the New Jersey Department of Environmental Protection to the Petitions of Hi Tech Trans, LLC for Declaratory Order and for Emergency Order and Other Relief in the above-referenced proceeding. In addition, we have enclosed 3 copies of a floppy diskette in WordPerfect 9.0 format.

We have also enclosed an additional copy of this Reply and request that this be date stamped so that our records can properly reflect the filing of this pleading.

If you have any questions concerning this, please do not hesitate to contact me.

Very truly yours,

Edward D. Greenberg

Encl.
cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

208298

FINANCE DOCKET 34192
HI TECH TRANS, LLC - - PETITION FOR DECLARATORY ORDER - -
HUDSON COUNTY, NJ

FINANCE DOCKET 34192 (SUB-NO. 1) 208297
HI TECH TRANS, LLC - - PETITION FOR DECLARATORY ORDER - -
RAIL TRANSLOAD FACILITY AT OAK ISLAND YARD, NEWARK, NJ

STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION REPLY TO THE PETITIONS FOR DECLARATORY ORDER AND FOR EMERGENCY ORDER AND OTHER RELIEF

The State of New Jersey, Department of Environmental Protection ("NJDEP") submits this Reply to the Petitions for Declaratory Order and For Emergency Order and Other Relief filed on or about June 17, 2003 by Hi Tech Trans, LLC. ("Hi Tech").[1]

The Surface Transportation Board ("Board") should deny these Petitions because they are time barred pleadings that essentially seek reconsideration of the Board's prior decision in this matter served November 20, 2002 ("Decision"). In addition, Hi Tech has again failed to establish that it is a railroad, that the State of New Jersey statutes and regulations it seeks to nullify are preempted by 49 U.S.C. §10501(b) or that the Board has jurisdiction over Hi Tech's solid waste collection and disposal activities. Nor has Hi Tech explained why the Board has jurisdiction to issue the relief requested by Hi Tech due to the provisions of the Eleventh Amendment.

[1] These pleadings will be referred here to as "Petition/Declaratory" and "Petition/Emergency" respectively.

I. Introduction

Hi Tech's Petitions are the latest in a series of proceedings commenced by Petitioner in its dogged effort to avoid complying with the laws of the State of New Jersey designed to protect the public health, safety and the environment by regulating facilities actively engaged in the collection and disposal of solid waste. Hi Tech is in the business, *inter alia*, of facilitating the disposal of construction and demolition ("C&D") solid waste, operating a transfer station at which the C&D waste is dumped and then loaded in railcars for shipment out of New Jersey. Hi Tech has been operating its transfer station, which is located in the middle of the Oak Island rail yard on property owned by the Canadian Pacific Railway Company ("CPR"), since September 2001. Hi Tech seeks to have the Board reconsider its prior decision in this proceeding (*see* decision served November 19, 2002; the "Decision") and now hold that Petitioner's activities are immune from any state or county environmental regulation due to the preemption provision in 49 U.S.C. §10501(b). In two other proceedings discussed below, Hi Tech seeks declaratory and injunctive relief prohibiting two New Jersey county agencies and NJDEP respectively, from enforcing *any* of the environmental regulations promulgated by the State of New Jersey for the protection of the health and safety of its citizens.

Hi Tech is aware that New Jersey law requires an operator of a transfer station to obtain a certificate of public convenience and necessity and take steps to minimize the risk of injury to the environment and the health and safety of the public.[2] Nevertheless, Hi Tech has made no attempt to comply with any of those requirements or to otherwise ensure that its operations are consistent with the environmental regulations applicable to the operation of a transfer station in New Jersey.

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[2] The purpose of the certification and permitting process is to ensure that (1) substantive environmental controls and requirements are designed into solid waste facilities at the time they are built; and (2) appropriate environmentally sensitive practices are in place when the facility commences operation.

Instead, Hi Tech has expended considerable resources in prosecuting actions before the Board, the United States District Court for the District of New Jersey and the Third Circuit in an effort to avoid all state regulation of Hi Tech's activities.

Hi Tech does not claim that the NJDEP regulations at issue here are unreasonable, discriminatory or unfair. Nor does Hi Tech allege that it is somehow incapable of complying with New Jersey law. Rather, Hi Tech simply does not *want* to comply with *any* of the state environmental regulations applicable to all other solid waste facilities operating in New Jersey. This dispute is not about onerous state or local regulations that are in reality a pretext to interfere with legitimate railroad operations or to prevent a rail carrier from locating a rail facility at some reasonable location. The simple truth of the matter is that Hi Tech was established with the specific intent of circumventing the environmental statutes and regulations applicable to other solid waste facilities, including solid waste flow control regulations. Hi Tech apparently believes that it has found a foolproof way to completely insulate itself from any and all state regulation of its solid waste disposal business by attempting to structure its business arrangements and operations in such a way as to bring itself within the preemption provision of 49 U.S.C. §10501(b).

Perhaps even more significantly, Hi Tech - - and the litigation described here - - is being closely watched by the solid waste industry. If Hi Tech is able to use preemption under 49 U.S.C. §10501(b) to circumvent state environmental regulation, the rest of the solid waste industry will routinely attempt to follow Hi Tech's road. The practical result would be the collapse of the carefully drawn system of state environmental regulation of solid waste, and the absence of any meaningful oversight of the collection and disposal of solid waste.

There are several problems with Hi Tech's plan. First, the federal preemption provision set forth in 49 U.S.C. §10501(b) does not apply to Hi Tech. Federal preemption of state law under

§10501(b) applies only to railroad activities that are integrally related to a railroad's ability to provide rail transportation services. However, the Board has already determined that Hi Tech's activities are not within its exclusive jurisdiction, and Hi Tech - - having previously claimed to be the local agent for CPR [3] - - has more recently conceded the obvious; namely, that it is *not* a railroad. Nor can Hi Tech come within the terms of §10501(b) by claiming it is closely associated with a railroad, does business with a railroad, operates on railroad property or is involved in intermodal shipments over a railroad.

Contrary to Hi Tech's suggestions, section 10501(b) is not a federal license to pollute or otherwise ignore the laws of state and local governments. Federal preemption of state and local regulation over a railroad is limited to circumstances where state or local authorities attempt to use regulation as a means of foreclosing or restricting a railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce. Accordingly, §10501(b) would not prohibit New Jersey from exercising its police power to impose nondiscriminatory environmental regulations to protect public health and safety - - even if Hi Tech was a railroad. As a matter of fact, real railroads, unlike Hi Tech, do not seek to misuse federal preemption as a means of escaping reasonable state regulation. To the contrary, real railroads routinely comply with applicable state and local regulation without protest.

Regardless, Hi Tech's Petitions are in reality time-barred appeals of the Decision. Its latest pleadings to the Board are being interposed for the purpose of attempting to derail actions of (1) the court from which Hi Tech itself first sought relief and (2) the administrative process of NJDEP. The

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[3] *See* Hi Tech Petition for Declaratory Order, filed April 4, 2002 at 1. In its Amended Petition dated May 1, 2002, Hi Tech both removed CPR as a party to its Petition and dropped any reference to it being an agent of that rail carrier.

Board should not permit its process or §10501(b) to be misused in this way and should deny the Petitions.

II. Status of the Litigation

Hi Tech's new Petition for Declaratory Order, filed June 17, 2003, has been assigned a new docket number (namely, F.D. No. 34192 (Sub-No. 1), which we assume is due to the fact that Petitioner slightly changed the title of its pleading.[4] Nonetheless, the pleadings relate to the same Oak Island rail yard facility and issues that were addressed by the parties which led to the Board's issuance of the Decision in November 2002. Since then, Hi Tech has prosecuted three separate litigations in the federal courts and is now the subject of an administrative proceeding in the State of New Jersey. NJDEP believes that a brief recitation of those proceedings and their current status will be instructive to the Board.

A) Hi Tech Trans, LLC v. Hudson County Improvement Authority et al, No. 02-3781 (D.N.J.)

In this proceeding, Hi Tech filed a complaint seeking to enjoin the Hudson County Improvement Authority ("HCIA") and Essex County Utilities Authority ("ECUA") waste flow control regulations, which generally regulate the method for handling and disposing of waste originating within the counties of New Jersey. Among the arguments raised by Hi Tech was that its activities, and those of the trucking companies which bring the waste to its facility, are preempted by 49 U.S.C. §10501(b). In addition to contesting the preemption argument, HCIA and ECUA counterclaimed, seeking to enjoin further operations of Hi Tech pending its compliance with the applicable state and local environmental statutes and regulations and to recover damages pertaining to its past activities.

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[4] In F.D. 34192, the proceeding is titled *Petition for Declaratory Order - - Hudson County, NJ,* while the title in F.D. 34192 (Sub-No. 1) is *Petition for Declaratory Order - - Rail Transload Facility at Oak Island Yard, Newark, NJ.*

While this proceeding is still pending, in an order dated April 1, 2003, Judge Hochberg reiterated her prior finding that Hi Tech's challenge to the New Jersey waste flow control laws were not preempted by §10501(b) and that Hi Tech was collaterally estopped, due to its failure to appeal the Board's Decision, from amending its complaint in an attempt to restate a different preemption argument. (Attachment 1.) And on June 30, 2003, Judge Hochberg issued a further decision dismissing all of Hi Tech's remaining claims, noting that Hi Tech had withdrawn its claim that it had the status of a rail carrier, as defined in 49 U.S.C. §10102(5), and that Hi Tech's activities were therefore not preempted by §10501(b) from state and local law enforcement. (Attachment 2, at 1-2 and n.2.) [5]

B) NJDEP Administrative Order

On May 28, 2003, NJDEP served an Administrative Order *In the Matter of Hi Tech Trans, LLC and David Stoller* (Matter EA ID# PEA030001-U131). (Attachment 3.) Alleging, *inter alia*, that Hi Tech was receiving construction and demolition waste in a facility that was neither licensed nor in compliance with the engineering and environmental specifications required for such sites, and that it was charging fees from trucking companies for depositing waste at the facility without having a required tariff on file, the Administrative Order charges Hi Tech and Mr. Stoller, its President and Chief Executive Officer, with violations of the New Jersey Solid Waste Management Act, N.J.S.A. 13:1 E-1 *et seq.*, the Solid Waste Utility Control Act, N.J.S.A. 48:13 A-1 *et seq.* and the regulations promulgated thereunder. Under the terms of the Order, Hi Tech and Mr. Stoller were directed to cease and desist from these activities within 20 calendar days of receipt (*i.e.*, before June 17, 2003.)

[5] While their claims for damages are still pending, the court did not grant the HCIA and ECUA requests to enjoin Hi Tech's activities, ruling that this issue was moot since NJDEP had issued an Administrative Order requiring Hi Tech to cease and desist its unlawful activities. (*Id* at 2-3, # n.3 and 6.)

Hi Tech and Mr. Stoller were entitled to request a hearing, as long as the hearing was requested prior to the June 17 compliance date. (*Id.* ¶¶ 8,9.) The order went on to recite the potential penalties that could be imposed in the event Hi Tech and/or Mr. Stoller were found to have violated the cited statutes. Rather than immediately seek a hearing or even a stay from NJDEP, Hi Tech sought emergency relief from the federal District Court and the United States Court of Appeals from the Third Circuit, which efforts were denied by the courts as described below. Ultimately, on June 18, 2003, Hi Tech and Mr. Stoller did finally file a request with NJDEP for a hearing and stay (Attachment 4). In that pleading, Hi Tech specifically contended that the allegations set forth in the Administrative Order are fatally defective because its facility is allegedly not subject to "NJDEP's solid waste facility regulations." (*Id.* at 2.).

On June 30, 2003, NJDEP Commissioner Bradley M. Campbell issued a decision in which he denied Hi Tech's request for a stay, but nevertheless granted emergency relief directing NJDEP's Office of Solid and Hazardous Waste Compliance and Enforcement to "forbear from seeking judicial enforcement of the Administrative Order for 60-days" as long as Hi Tech complied with a series of enumerated conditions set forth in the decision. (Attachment 5.) [6]

C) Hi Tech Trans, LLC v. New Jersey Department of Environmental Protection (No. 03-2751) (D.N.J.)

Without either seeking a stay of the Administrative Order or exercising its rights to a hearing before NJDEP, Hi Tech filed a complaint in the federal District Court requesting that it enjoin enforcement of the cease and desist order. Due to its close relationship to the issues raised in the

[6] In his cover letter to the parties, Commissioner Campbell noted that the charges against Hi Tech were "serious" and that unlawful solid waste facilities adversely affect local residents, customers and other participants in the solid waste industry and that they "interfere with the statutory mandate of the [NJDEP] and the counties to plan for and police solid waste operations within their jurisdictions." (*Id.*.) June 30, 2003 letter at 2.

HCIA case, No. 02-3781 (*supra*), this matter was also assigned to Judge Hochberg. Noting that Hi Tech had not availed itself of its right to request an administrative hearing or stay from NJDEP, and finding that the complaint was barred pursuant to the provisions of the Eleventh Amendment, the court denied Hi Tech's motion for a preliminary injunction in a decision dated June 16, 2003. (Attachment 6.)

In that order, the Court observed that Hi Tech might be able to cure the Eleventh Amendment defect by amending its complaint to name an NJDEP official, but, if it did so, the court would consider abstaining pursuant to the abstention doctrine enunciated by the Supreme Court in *Younger v. Harris 401 U.S. 37 (1971)* and *Burford v. Sun Oil Co., 319 U.S. 315 (1943)*. Shortly thereafter, Hi Tech renewed its request to enjoin NJDEP from enforcing the order and amended its complaint in order to add two officials of NJDEP as defendants in the matter.[7] In an order issued June 20, 2003, the court again declined to enjoin enforcement of New Jersey's state environmental laws and regulations, this time due to considerations of federalism and comity. As relevant here, Judge Hochberg found that abstention was warranted because:

> (1) There is a state administrative proceeding currently pending which is judicial in nature ... (2) *New Jersey has a high significant state interest* in the regulation of its solid waste facilities ... and (3) the DEP and the appellate courts of New Jersey provide an adequate opportunity for Hi Tech to raise all of its federal claims.

(Attachment 7 at 3, n.5; emphasis supplied; citations omitted).

Judge Hochberg added that any exercise of the court's jurisdiction in this instance might well be disruptive of New Jersey's efforts to deal with matters of substantial public concern. In Judge

[7] Accordingly, the title of this litigation has now been amended to *Hi Tech Trans, LLC et al. v. Bradley M. Campbell, Commissioner of the State of New Jersey, Department of Environmental Protection, et al.*

Hochberg's words:

> ... New Jersey's environmental regulations are clearly comprehensive and serve to ameliorate the important policy problems of public heath, welfare and safety relating to the storage and disposition of solid waste ...
>
> Plainly stated, if solid waste facilities can immunize themselves from state environmental licensing regulations through the opportunism of locating themselves near a railroad and using rail transportation, the comprehensive regulatory scheme established to protect the environment and public health safety may well be seriously eroded ... [T]his Court's intervention into the state's comprehensive regulatory scheme of solid waste facilities would undermine state efforts to adopt a coherent and complete policy with respect to an area of such grave public concern.

Id. at 4, n.6

The court accordingly denied Hi Tech's request to enjoin the administrative proceeding initiated by NJDEP since this would "seriously undermine New Jersey efforts to establish and maintain a coherent and uniform regulatory policy." Hi Tech was instead advised of its right to seek any review or emergent relief it might deem appropriate through the state's administrative and judicial forums.[8]

D) Third Circuit Litigation

Immediately after Judge Hochberg issued her June 16, 2003 order denying Hi Tech's request to enjoin NJDEP's Administrative Order, Hi Tech appealed to the United States Court of Appeal for the Third Circuit and sought an emergency stay pending appeal. That action was originally docketed as *Hi Tech Trans, LLC v. State of New Jersey Department of Environmental Protection, No. 03-2773.* In an order issued June 18, 2003, that court denied Hi Tech's Emergency Motion for a Stay pending appeal, but set an expedited briefing schedule (Attachment 8.) The briefing schedule was

[8] The court noted, in addition, that any claimed emergency on Hi Tech's part was "of Hi Tech's own making" in that the dispute has been pending for over a year, during which time Hi Tech neither sought reconsideration nor judicial relief from the Board's refusal to grant the relief Hi Tech sought in F.D. 34192. (*Id.*)

subsequently extended and, Hi Tech's appeal of the District Court's refusal to enjoin the administrative proceeding is now pending the decision of the Third Circuit.[9]

III. Hi Tech Is Not Entitled to Injunctive Relief

The Board's criteria for issuance of an injunction follow the four-part test enunciated in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F. 2d 841, 843 (D.C. Cir. 1977) ("*WMATC*"); namely, that the movant establish (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of the requested relief; (3) that the relief will not substantially injure other parties; and (4) that granting the relief is in the public interest. *DeBruce Grain, Inc. v. Union Pacific Railroad Company*, STB Docket No. 42023 (STB served April 27, 1998) at 3, n. 7. Before even reaching this issue, however, Hi Tech is required to demonstrate that the Board has the authority to issue an injunction restraining NJDEP from pursuing its administrative prosecution.

Surprisingly, Hi Tech has failed to provide any authority for the proposition that the Board has the jurisdiction to enjoin the action of a State acting pursuant to its plenary police power under the Tenth Amendment.[10] Although it suggests that this authority is found in 49 U.S.C. § 721, the only cases cited are ones in which the Board was staying some action of private parties who were

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[9] Technically, Hi Tech lodged separate appeals of both the June 16 and June 20 orders of Judge Hochberg with the 3rd Circuit. In motions filed on June 26, 2003, Hi Tech sought to consolidate both appeals and amend the caption of the appellate proceedings as *Hi Tech Trans, LLC et al. v. Bradley M. Campbell, Commissioner of the State of New Jersey, Department of Environmental Protection, et al.*

[10] The Tenth Amendment grants states the right to establish and enforce laws protecting the public's health, safety and general welfare. *See generally, Jacobson v. Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358, 361 (1905).

affirmatively seeking the benefits of the agency's jurisdiction.[11] For example, in *Public Views on Major Rail Consolidations,* STB Ex Parte No. 582 (STB served March 17, 2000 and April 7, 2000); *aff'd sub nom. Western Coal Traffic League v. STB,* 216 F. 3d 1168 (D.C. Cir. 2000), the Board issued a moratorium upon the filing of railroad merger applications pending the issuance of new merger rules; hence, its decision to freeze the status quo involved only parties who were would-be applicants seeking some affirmative relief from the agency *(i.e.*, merger approval and immunity from the antitrust laws, pursuant to 49 U.S.C. § 11321 *et seq.*).

Similarly, in *Amoskeag Co. v. I.C.C.* , 590 F. 2d 388 (1st Cir. 1979), the Interstate Commerce Commission's action only compelled a railroad holding company to abide by commitments it had made not to make additional purchases of railroad stock without prior Commission approval, where those commitments had been made for the purpose of terminating an unlawful control proceeding (under former section 5(5) of the Interstate Commerce Act, now 49 U.S.C. § 11323) that had been instituted against that company. And, in *DeBruce Grain, supra,* of course, the Board refused to enjoin a rail car supply program that had been instituted by a railroad.

These cases stand in stark contrast to the present situation, where Hi Tech is seeking to have the Board enjoin the State of New Jersey from enforcing its environmental health and safety statutes and regulations. Hi Tech has offered no support for the proposition that the Board has powers to enjoin the processes of a sovereign state in the exercise of its police powers.

Even assuming the Board had the jurisdiction to issue such an order, which does not appear to be the case, the agency should observe the same abstention principles that impelled Judge

[11] Hi Tech not only fails to make a prima facie demonstration that the Board has statutory authority to issue such an injunction, it utterly fails to even address the fact that such an injunction, even if expressly statutorily authorized, would clearly be barred by the Eleventh Amendment. *See Point VI, infra.*

Hochberg ultimately to dismiss Hi Tech's action in Civil No. 03-2751. (*See* Attachment 7.) Judge Hochberg determined that abstention was appropriate, pursuant to the Supreme Court's holdings in *Younger v. Harris*, 401 U.S. 31 (1971) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), because the Administrative Order proceeding is judicial in nature, New Jersey has a clear and compelling interest and need for environmental oversight of the activities of solid waste facilities, and Hi Tech has appropriate forums at NJDEP and in the state courts to raise any state or federal defenses it may have. For the same reasons, the Board should decline to intervene in the pending administrative process initiated by the Administrative Order.

Moreover, Hi Tech obviously elected to seek relief from NJDEP's attempts to enforce its environmental laws by initiating litigation in the federal courts. Neither the District Court nor the Court of Appeals has sought guidance from the Board, although both are well aware of Hi Tech's preemption claims, the applicable case law, as well as the Board's prior Decision in this proceeding. Accordingly, because the federal courts have full authority to hear claims pursuant to federal law, and to grant any appropriate relief thereon, the Board should not interfere with the pending judicial process and should deny Hi Tech's Petitions. *Green Mountain Railroad Corporation - - Petition for Declaratory Order*, STB Finance Docket No. 34052 (STB served May 28, 2002) at 4.

In any event, Hi Tech could not satisfy the four-part test of *WMATC*. First, Hi Tech cannot prevail on the merits, having failed to provide any support for the proposition that a rail shipper loading rail cars is exempt from the legitimate exercise of a state's police powers, a point discussed more fully below in Section V. Second, Hi Tech cannot demonstrate the existence of irreparable harm. The only harm alleged by Hi Tech is that it may need to comply with New Jersey environmental health and safety statutes and regulation applicable to all other solid waste facilities.

Although the cost of such compliance might reduce the profits Hi Tech may now be unlawfully reaping, this hardly qualifies as the type of irreparable injury sufficient to support injunctive relief.

Third, any stay issued here would clearly injure a number of parties, including HCIA and ECUA, Hi Tech's competitors who are abiding by the state's environmental laws, the citizens of New Jersey and the environment that might be damaged by Hi Tech's continued defiance of the law.[12] Fourth, as recognized by Judge Hochberg, the public interest is best served by NJDEP's enforcement of the state's environmental regulations. (*See* Attachment 6.)

IV. Hi Tech's Petition is Barred by Res Judicata and Claim Preclusion

Although it has generated a great deal of litigation, Hi Tech neither appealed the administratively final Decision to the Board nor otherwise sought reconsideration by the agency, notwithstanding the appellate procedures available to it in 49 C.F.R. Part 1115. Nor did it appeal the Decision to an appropriate U.S. Circuit Court of Appeals. As a result, Hi Tech is precluded from re-litigating all issues that were before the Board due to the doctrines of *res judicata* and collateral estoppel.

While 49 C.F.R. §1115.4 does provide that a petition to reopen a Board decision can be filed at any time, parties seeking this relief must support such requests with a detailed statement of any alleged material error, new evidence or substantially changed circumstances.[13] Aside from the fact

[12] D&H's desire to continue receiving Hi Tech's traffic is similarly unpersuasive. Even assuming it was relevant, neither Hi Tech nor D&H have argued, let alone explained, how compliance with New Jersey environmental law - - or the parties' own lease agreement (*infra* at 15-17) - - would reduce the volume of rail traffic.

[13] Petitions to re-open are rarely granted as the Board has made it clear that it "must approach petitions to reopen ... cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose. *Arizona Pub. Serv. Co. v. Atchison, T.&S.F. Ry. Co.*, 3 S.T.B. 70, 75 (1998); *West Texas Utilities Company v. The Burlington Northern and Santa Fe Railway Company,* STB Docket No. 41191 (STB served May 12, 2003).

that it does not literally request that the Decision be re-opened, Hi Tech does not now allege that there was any material error, new evidence or changed circumstances. Instead, Hi Tech's only justification for resuming its campaign at the Board is its assertion that the District Court (whose process Hi Tech initiated) and NJDEP are taking action with which it disagrees. If Hi Tech ultimately believes itself to be aggrieved in those forums, however, there are appellate procedures available to it when and if decisions adverse to its interests are ultimately issued.

Hi Tech seeks to sidestep its *res judicata* and collateral estoppel problems by suggesting that the Board hinted that NJDEP has no regulatory oversight of Petitioner's activities because Hi Tech purportedly operates at the Oak Island rail yard. However, Hi Tech's operation at the Oak Island facility was an issue in its original petition to the Board, and Hi Tech could have raised the contentions it advances now at an earlier stage of this proceeding.

Having failed to do so, Petitioner is barred by principles of issue and claim preclusion from raising this new issue at this time. STB Finance Docket No. 28799 (Sub-No. 9), *St. Louis Southwestern Railway Company Arbitration Appeal* (STB served Aug. 15, 1995) (application of *res judicata* and issue and claim preclusion are necessary to protect parties from multiple lawsuits, conserve judicial resources and minimize the possibility of inconsistent decisions).

Hi Tech's filing of a second declaratory order petition with a slightly different name and a new docket number changes nothing. This is the same case, involving the same parties and the same controversy which commenced in April, 2002 when Hi Tech filed its first petition for declaratory order. Having elected as a litigation strategy not to appeal the Board's Decision in the mistaken impression that salvation lay in the hands of the federal courts, Hi Tech is barred from coming back to the agency to try once again with a slightly different argument.

V. Hi Tech's Activities Are Not Within The Scope of The Federal Preemption

Nor is there any reason for the Board to consider the issue of whether Petitioner is somehow immune from exercise of its police powers to regulate solid waste. Hi Tech now contends that all of its activities are preempted, due to §10501(b), because its operations take place at CPR's Oak Island rail yard. (Petition/Declaratory at 5.) Petitioner goes on to state that the Board "hinted strongly" in the Decision that Hi Tech's operations would be preempted because part of its function involved the transfer of solid waste from trucks to rail cars. (*Id.*) These arguments have no merit. First, and as NJDEP has pointed out previously, Hi Tech is not a rail carrier, as that term is defined in the statute (49 U.S.C. §10102(5)), for the obvious reason that it does not provide common carrier railroad transportation.[14] Indeed, while Hi Tech did once file a notice of exemption under 49 C.F.R. §1150.32 to acquire operating rights on 640 miles of track belonging to the Canadian Pacific Railway, it voluntarily withdrew that notice.[15]

Second, notwithstanding its shift in position, the fact is that Hi Tech is not a railroad and is not even a railroad "agent", whatever that term is meant to connote. Hi Tech is simply a shipper. It is paid by various parties to receive, consolidate and dispose of solid waste originating from various locations both within and outside of New Jersey. And, it then tenders that waste *as a shipper* to CPR for transportation to disposal sites outside the state.

Hi Tech's true function is demonstrated by materials filed as part of its pleadings to the Board. For example, in the Operational License Agreement between Hi Tech and the Delaware and

[14] *See* NJDEP Reply to Amended Petition, filed June 6, 2002 ("NJDEP Reply"), at 8-10.

[15] *Hi Tech Trans, LLC-Operation Exemption -Over Lines Owned by Canadian Pacific Railway and Connecting Carriers,* F.D. No. 33901.

Hudson Railway Company, Inc., ("D&H") doing business as CPR, dated November 6, 2000, which is appended to its Petition/Emergency (as Exhibit A), Hi Tech is to pay a use and access fee to operate on CPR's premises (on a non-exclusive basis) at the Oak Island rail yard. (*See* ¶¶ 1, 3 & 6). However, in order to persuade CPR to allow Hi Tech to operate its facility at the Oak Island rail yard, Hi Tech was required to tender a minimum number of cars per year, or what the agreement refers to as an "Annual Car Load Guarantee," at rates as set forth in Transportation Agreement No. STB-CPRS 136814 (the "Transportation Agreement"). All of this is intended to generate an Annual Car Load Guarantee Fee, which Hi Tech is to pay "so long as CPR has system capacity to handle the traffic and is providing the services as contemplated pursuant to the Transportation Agreement." (*Id.*) In other words, Hi Tech pays CPR, a fact which is inconsistent with agency or even subcontractor status. Also, Hi Tech is restricted to use the facilities solely for handling and tendering shipments of solid waste to CPR and any construction, installation, maintenance and improvement of the facilities it is using are to be exclusively at its "sole expense." (*Id.* at ¶ 4.) Again, despite the fact Hi Tech is located at CPR's rail yard, Hi Tech's activities are not part of CPR's rail services.

While there are many different types of agency relationships in the rail business, Hi Tech's operation of this facility on CPR property and payment of annual shipment guarantees demonstrates clearly that it is a shipper and that its operations are pursuant to its primary business of solid waste disposal. Indeed, Hi Tech's president and chief executive officer, David C. Stoller, boasts that his company "has become the largest customer (in terms of revenue produced)" of CPR. *See* Petition/Emergency, Verified Statement of David C. Stoller at 3.[16] Similarly, Mr. Lawrance of the

[16] Parenthetically, by citing Mr. Stoller's statement, NJDEP does not mean to convey the impression that it agrees with its contents, as that is not the case. For example, while Mr. Stoller recites the now familiar mantra that NJDEP agreed, until the last 30 days, that its activities were preempted from its oversight, that is obviously not accurate. NJDEP intervened in this STB litigation on April 23, 2002, and has consistently argued that Hi Tech required a license from the NJDEP in order to construct and operate the solid waste transfer station and that its activities are not preempted by § 10501(b).

D&H, describes Hi Tech as "the largest shipper served by D&H at the Oak Island yard." Petition/Emergency, Verified Statement of Steven Lawrance at 3.

Moreover, the Operational License Agreement also demonstrates that both CPR and Hi Tech fully understood and expected, when the document was executed, that Hi Tech would need to apply for an appropriate license from NJDEP. In that regard, the agreement specifically obligates Hi Tech to obtain all required permits or exemptions, and recognizes NJDEP as the prospective licensing authority. (*Id.* at 4(e).)[17] Accordingly, any attempt by Hi Tech to imply that CPR intended to bring Hi Tech within the scope of the preemption protection enjoyed by CPR as a rail carrier is belied by the specific terms of the Operational Agreement.

That CPR regards Hi Tech as a shipper rather than as an integral component of its rail transportation services is also evidenced by the terms of the Transportation Agreement between these parties. (*See* Attachment 9.) The provisions of the contract demonstrate that: CPR, not Hi Tech, has exclusive control over the performance of CPR's "transportation services" (¶ 4); Hi Tech is subject to demurrage, not per diem, in the event CPR is required to supply cars (¶ 9); Hi Tech "has selected the destination and disposal site" for its shipments and actually "certifies that [CPR] has not participated in, nor taken any active interest in, the site selection for the storage or disposal" of the waste it tenders (¶ 14); Hi Tech - - not CPR - - has the necessary contract with the destination

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[17] This article of the Agreement provides:
Prior to commencement of any operations, HTT shall obtain all permits or exemptions or evidence of same necessary for the construction, use and operation of the facility....Any costs incurred by CPR in the processes (sic) of obtaining any leases..., permits or operating authority for HTT will be paid by HTT....HTT will not be responsible for any legal fees incurred by CPR in reviewing submissions made by HTT or costs incurred by CPR in obtaining permits, authority or exemptions in the name of CPR including costs incurred by CPR in connection with meetings with the New Jersey Department of Environmental Protection by Public Affairs Consultants.

disposal sites (*id.*); and that Hi Tech is not an agent of CPR (¶ 17).[18] Again, Hi Tech is only a shipper that happens to be functioning, in part, on property essentially leased from a railroad.

Hi Tech argues that its solid waste disposal activities are subject to the exclusive jurisdiction of the Board and that *any* state regulation is preempted by federal law. Petition/Emergency at 3, 9.[19] None of the precedent Hi Tech cites supports its expansive, self-serving view of the nature of the preemption provision. Indeed, any shipper of toxic, hazardous materials could avoid local and state regulation of its storage facilities by the simple artifice of placing them alongside rail tracks, effective environmental regulation would be virtually impossible. For example, many, if not most, chemical shippers have sidetrack arrangements with railroads, whereby their loading and unloading facilities are situated adjacent to or on land that is leased to or from railroads. These shippers typically have transportation agreements with their serving railroad containing minimum shipment guarantees. Yet, under Hi Tech's rationale, all state or local permitting of the construction and operation of those facilities would be preempted solely because the product is being loaded into or unloaded from rail cars. Happily, for the environment and the citizens of this country, that is not the law.

Hi Tech contends here that even if it is not a rail carrier itself, its activities are preempted as integrally related to intermodal transportation that includes shipment by rail. Hi Tech has not cited,

[18] Parenthetically, consistent with the provisions of the Operational License Agreement, CPR and Hi Tech recited the importance for Hi Tech to obtain the necessary environmental permits from NJDEP (and HCIA and ECUA) by making this an acknowledged contingency that might impair the parties' ability to enter into the Transportation Agreement. *Id.* at ¶ 31.

[19] In the administrative proceeding before NJDEP, Hi Tech specifically contends that (1) "all alleged non-compliance [with the various environmental laws] is premised upon application of New Jersey solid waste requirements to a facility that is not subject to such regulations," and (2) NJDEP's "allegations [in Attachment 3] are premised upon NJDEP's erroneous finding that Hi Tech's operations may be regulated as a solid waste facility under New Jersey Law." (Attachment 4, Administrative Hearing Request and Tracking Form, at 2-3.)

however, to any authority supporting its position. Instead, Hi Tech has attempted to parse the phrase "transportation by rail carrier" by separating "transportation" from "rail carrier." Hi Tech seems to argue (Petition/Declaratory at 8.) that because its facilities and operations arguably come within the technical definition of "transportation" under § 10102(6)(C) and are related to intermodal transportation involving rail service, any regulation of Hi Tech's activities is tantamount to regulation of "transportation by rail carrier."

The problem with Hi Tech's strained construction of the phrase "transportation by rail carrier" is that it would result in the preemption of essentially all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation. For example, under Hi Tech's theory, shippers, truckers and freight forwarders would be exempt from state and local health and safety regulations so long as the products they handled would at some point in the distribution chain be shipped by rail.[20] Obviously, Congress never intended such a result when it enacted 49 U.S.C. § 10501(b), and neither the STB nor the courts have ever suggested that preemption under § 10501(b) extends beyond rail carriers engaged in rail transportation. In fact, Hi Tech's argument that its activities are preempted because it participates in intermodal shipments that include rail transportation was previously rejected by the Board:

> Hi Tech's attempt to link these activities as one continuous intermodal rail movement must fail. As NJDEP points out, under Hi Tech's theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption clearly does not go that far; nor does the Board's jurisdiction.

Decision at 3.

[20] To the extent Hi Tech seeks to support preemption of its activities on the grounds that NJDEP regulation of Hi Tech indirectly impacts CPR, that contention also fails. Anyone manufacturing, shipping, storing, loading or delivering goods or commodities eventually destined for transportation by rail would be able to claim immunity from state and local regulation if that were the test.

In any event, Hi Tech materially overstates the preemptive effect of the STB's exclusive jurisdiction over "transportation by rail carriers" and the application of preemption under 49 U.S.C. § 10501(b). The Board has made clear that § 10501(b) does not prevent state or local governments from exercising their traditional police powers in a nondiscriminatory fashion to protect public health and safety. *See, e.g., Borough of Riverdale – Petition for Declaratory Order*, STB Finance Docket No. 33466 (STB served September 10, 1999). Federal preemption of state or local regulation over a rail carrier is limited to situations where such regulations frustrate or defeat railroad operations:

> [W]hile state and local government entities such as the Borough retain certain police powers and may apply non-discriminatory regulation to protect health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce.

Id. at 8.

Indeed, in every instance in which this topic has come up, the Board has made it clear that §10501(b) was intended to preempt state and local regulation that would "deny the carrier the right to construct facilities or conduct operations." *See, e.g., Joint Petition for Declaratory Order - - Boston and Maine Corporation and Town of Ayer, MA, ("Town of Ayers")* STB Finance Docket No. 33971 (STB served May 1, 2001) at 8. Similarly, the Board has added the important *caveat* that §10501 is not intended to interfere with the non-discriminatory exercise of state police powers that are essential for the protection of public health and safety or to otherwise preclude the important role states play in enforcing Federal environmental statutes. (*Id.*, at 9; *Auburn & Kent, WA - - Pet. For Declar. Order - - Stampede Pass Line,* 2 S.T.B. 330, 337-39 (1997).)

Consequently, the Board has elected to entertain and grant petitions for declaratory orders only where the state or local community attempted to use regulation as a means to prohibit or impede legitimate rail operations as a "not in my backyard" or "NIMBY" response to change. *See, e.g. Town of Ayers, supra; North San Diego County Transit Development Board - - Petition for Declaratory*

Order (STB served August 21, 2002). At the same time, however, the Board has elected not to intervene where the state or local community is not attempting to frustrate and delay rail operations, but is instead concerned with true environmental issues. *Fletcher Granite Company, LLC - - Petition for Declaratory Order,* STB Finance Docket No. 34020 (STB served June 25, 2001) at 2.

Thus, even if Hi Tech could somehow be found to be within the exclusive jurisdiction of the STB, §10501(b) would not prohibit New Jersey from exercising its police power to enforce NJDEP environmental regulations in a nondiscriminatory manner. The environmental regulations at issue in this case have neither the purpose nor effect of prohibiting Hi Tech from operating a transfer station. NJDEP regulations do require, however, that Hi Tech meet the same requirements applicable to all other transfer stations operating in New Jersey. Hi Tech has not alleged, much less demonstrated, that it is incapable of complying with NJDEP regulations; Hi Tech simply would prefer to avoid the regulatory obligations and responsibilities shouldered by all of its competitors.

Perhaps more to the point, NJDEP is not seeking to deny CPR or any other railroad the right to construct rail related facilities, conduct rail operations or even obtain occupancy permits. Nor is NJDEP seeking to deny Hi Tech the ability to tender its traffic to CPR or any other railroad.[21] To the contrary, the Hi Tech facility is located in the middle of a rail yard and NJDEP does not suggest that the challenged operations should not be conducted from this location. Nor does anyone seek to constrain in any way CPR's ability to move solid waste via rail in general or to do so specifically from a facility located at its Oak Island rail yard.

[21] In support of Hi Tech, the D&H representative makes the point that closing down Hi Tech will deprive it of revenue. (Lawrance Statement at 3.) NJDEP is not seeking to close Hi Tech unless it continues to refuse to comply with state law and, in any event, Mr. Lawrance fails to explain why D&H has not insisted that Hi Tech comply with its contractual obligation to secure all required regulatory approvals.

Instead, it is Hi Tech which has sought, for inexplicable reasons, to wage a seemingly unending legal battle in its attempt to avoid compliance with any state or local environmental health and safety regulations. Under NJDEP's solid waste regulations, which are applicable to all solid waste transfer stations, permits are issued to prospective operators after specific construction and operating requirements are reviewed and vetted by agency staff. N.J.A.C. 7:26-2.10. In each instance, this specific review is necessary to ensure that the facility has an appropriate containment system to minimize migration of liquids, dust, noxious or toxic odors from the confines of the facility or unnecessary infestation from rodents and other pests. N.J.A.C. 7:26-2B.5. In addition, the facility's operating practices are reviewed to prevent, again, unacceptable environmental damage that could otherwise be minimized through relevant and, frequently, collaboratively established operating guidelines. N.J.A.C. 7:26-2B.9.

Claiming to rely on informal advice from NJDEP that Hi Tech would not need such environmental approval due to its purported status as a rail facility (Petition/Emergency at 5), Hi Tech commenced operations without complying with NJDEP regulations, and has therefore refused to comply with any of the applicable state statutes or regulations.[22] The result? Completely aside from its long running violation of the carefully crafted waste flow control regulations, which are a great concern to the State of New Jersey, HCIA and ECUA, Hi Tech has been operating the facility with no regard to its obligations under the New Jersey environmental health and safety laws. By way of example, HCIA and ECUA provided NJDEP with copies of photographs recently taken of the Hi

[22] Hi Tech has failed to substantiate the alleged informal NJDEP advice cited by Mr. Stoller (Stoller Verified Statement at 5). Even assuming that some NJDEP employee made such a statement (and there is no evidence that such advice was ever given), it is plain from Hi Tech's frequent citations to informal opinions (*see, e.g.*, Petition/Emergency at 5), that it is aware that they are not binding on an agency. In any event, Hi Tech was obligated to secure the necessary authorization from NJDEP by its agreement with CPR, but elected nonetheless to ignore that obligation as well.

Tech facility, some of which are attached as Exhibit 10, and these photographs graphically illustrate Hi Tech's lack of concern for state environmental laws.[23]

Hi Tech also suggests that NJDEP itself has determined that § 10501(b) preempts its existing regulations. Petition/Declaratory at 10-11. Hi Tech's contentions in this regard are both disingenuous and inaccurate. While NJDEP is considering amending its regulations to lessen the modest burden they currently impose on railroads, by eliminating the need to actually obtain a physical permit in order to construct and operate a solid waste transfer station, that is only a proposal. The existing regulations remain in place and the proposal may never be implemented. Moreover, eliminating the need for a railroad to obtain a permit would not obviate the numerous construction and operational requirements that NJDEP requires of all such enterprises.[24]

In its effort to avoid oversight, Hi Tech has raised the ante for all of the stakeholders, including the NJDEP, other state environmental agencies, local and county authorities and the Board itself. If Hi Tech is able to use the preemption provision in § 10501(b) to evade all environmental oversight by NJDEP, it will plainly not be the last waste facility that will follow that path. If all state environmental regulation can be easily evaded by simply locating solid waste facilities next to a railroad, who will regulate and oversee those activities? Is the Board prepared to have its

[23] These photographs show the total lack of containment of solid waste, the migration of solid waste and dust particles, the lack of containment on the loaded rail cars, and accumulated debris that contravene New Jersey's solid waste regulations.

[24] Hi Tech elected to selectively present the proposed regulations when it attached part of the draft rules to its new Petition for Declaratory Order. In doing so, it eliminated the provisions which detail, *inter alia,* the need for rail carriers to ensure that all activities of this nature are conducted in an enclosed structure (rather than in the open air, as Hi Tech currently operates), the requirement that the operator describe the facilities and certify that the facility will not be opened so as to expose the employees, public or environment to such wastes, that containers are sealed at all times, that there will not be a migration of odors or other contaminants, etc. But, the salient point here is that while the draft regulations are only that and may never be promulgated, and while Hi Tech would not be covered by the draft since the proposed exemption would in any event only be applicable to rail carriers as defined by 49 U.S.C. § 10102(5) that provide common carrier rail transportation, Hi Tech has elected to comply with no regulations at all.

environmental staff engage in the review of the design, engineering, and construction of solid waste transfer stations? Is the Board prepared to undertake the considerable obligation to monitor the continuing operation of solid waste facilities located across the country? If not, is there really to be no environmental oversight at all for such solid waste facilities? And, while Hi Tech purports currently to be handling only what it claims to be relatively benign construction and demolition waste, what is to stop Hi Tech - - and other such facilities - - from handling extremely toxic or hazardous commodities if state oversight is preempted as Hi Tech suggests? Just to pose the question demonstrates how dangerous the situation could become.

It is precisely to prevent the result sought by parties such as Hi Tech that there is strong presumption against preemption. As Mr. Justice Brandeis, writing for the Court, said in *Napier v. Atlantic Coast Line,* 272 U.S. 605, 611, 47 S.Ct. 207, 209 (1926), "The intention of Congress to exclude States from exerting their police power must be clearly manifested." And the Supreme Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, has resolved close cases in favor of a continuing power on the part of the States to legislate in their customary fields and thus has permitted state regulations to mesh with federal controls. *See, Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 54 S.Ct. 267 (1934); *Townsend v. Yeomans*, 301 U.S. 441, 454, 57 S.Ct. 842, 848 (1937); *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 63 S.Ct. 617 (1943). Indeed, "[p]reemption analysis begins with the 'presumption that Congress does not intend to supplant state law.'" *AGG Enterprises v. Washington County*, 281 F.3d 1324, 1327 (9th Cir. 2002). Where federal and state or local enactments overlap in their effects on non-governmental activities, the proper judicial approach is to reconcile the operation of both statutory schemes rather than hold one completely ineffectual. *See, e.g., Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 132, 98 S.Ct. 2207 (1978), *reh'g denied*, 439 U.S. 884, 99 S.Ct. 232

(1978). In *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the court noted the presumption against preemption recognized by the U.S. Supreme Court, *id.* at 1327-28, and emphasized that the Senate Report on the final form of the bill that became the ICCTA stated that the exclusivity in the legislation "is limited to remedies with respect to rail regulation – not State and Federal law generally ... because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation," *id.* at 1338, thus identifying a clear limit on the use of the exemption provided in the ICCTA.

The Board should not give credence to Hi Tech's strained attempt to construe federal preemption of "transportation by rail carriers" in order to shield highly regulated activities such as solid waste collection and disposal that historically have been subject to state and local regulation. *See, e.g., AGG Enterprises, supra*, 281 F.3d at 1328 ("[o]ne could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety and aesthetic well-being of the community"). Indeed, Congress has explicitly found that the field of solid waste collection and disposal is properly subject to state regulation. *See*, 42 U.S.C.A. § 6901(a)(4) (stating that "the collection and disposal of solid waste should continue to be primarily the function of State, Regional, and local agencies").

To repeat a point that Petitioner totally ignores, the Board has made it plain in numerous cases,[25] including the Decision itself (at 3), that the preemption in §10501(b) does not foreclose state and local governmental agencies from exercising their police powers in a non-discriminatory fashion to protect health and safety as long as this does not foreclose or restrict a *railroad's* ability to conduct its operations or unreasonably burden interstate commerce. No *railroad* has suggested, in this

[25] *See, e.g.* STB Finance Docket No. 33466, *Borough of Riverdale - Petition for Declaratory Order* (STB served September 10, 1999); *Town of Ayer, supra; Fletcher Granite Company, supra.*

proceeding, that its activities are in any way restricted or that interstate commerce is being burdened by NJDEP's actions. For that matter, not even Hi Tech's Petition makes this argument. Hi Tech instead would simply have the Board nullify New Jersey's right, obligation and responsibility to protect its citizen's health and safety, based on its unsupported and erroneous assertion that it is somehow immune from such oversight. The Board should not - - indeed cannot - - provide this relief to Hi Tech.

VI. The Board Lacks Subject Matter Jurisdiction Over Hi Tech's Petition Pursuant To The Eleventh Amendment To The Constitution

In its initial reply to Hi Tech's Amended Petition for Declaratory Order, filed June 6, 2002, NJDEP argued that the Board should deny Hi Tech's petition because the agency is barred by the Eleventh Amendment from ordering the relief requested by Hi Tech. While the Board did deny Hi Tech's petition in the Decision, it did not reach that argument because it decided not to institute the requested proceeding. (Decision at 5, n. 10.) As Hi Tech has again sought a declaratory order from the Board covering the same topic, NJDEP renews and adopts the argument on this point that was set forth in that reply. (NJDEP Reply to Amended Petition for Declaratory Order, filed June 6, 2002 at 5-7.)

As noted above, in her order of June 16, 2003, Judge Hochberg dismissed Hi Tech's suit against NJDEP on Eleventh Amendment grounds. The Court found that

> under the Eleventh Amendment, a plaintiff other than the United States or a state may not sue a state in federal court without the latter state's consent, unless Congress abrogates the state's Eleventh Amendment immunity pursuant to a constitutional provision granting Congress that power.

(Attachment 6, at 2; citations omitted.) Despite the fact that NJDEP raised this argument before the Board previously, Hi Tech has again failed to respond, disagree or otherwise attempt to explain why the Board should similarly not dismiss its new pleadings.

Regardless, it is clear that pursuant to the Supreme Court's decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002)("*SCSPA* "), the Board lacks jurisdiction over the instant petition filed by Hi Tech. In *SCSPA,* the Court faced the question of whether state sovereign immunity precludes the Federal Maritime Commission, an executive-branch administrative agency, from adjudicating a private party's complaint that a state-run port has violated the Shipping Act of 1984, 46 U.S.C.App. § 1701 *et seq.* The Court held that "state sovereign immunity bars the [agency] from adjudicating complaints filed by a private party against a nonconsenting state." *SCSPA,* 535 U.S. at 760, 122 S.Ct. at 1874. The Court reasoned:

> if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency....

Id.

The jurisdictional analysis is not altered by the fact that Hi Tech seeks only declaratory and injunctive relief, not a money judgment, against the NJDEP:

> [W]e explained in *Seminole Tribe* that "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." 517 U.S., at 58, 116 S.Ct. 1114. We see no reason why a different principle should apply in the realm of administrative adjudications.
>
> *Id.*, 535 U.S. at 769, 122 S.Ct. at 1879.

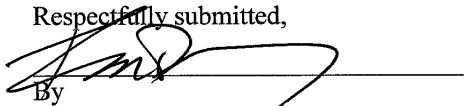
Finally, subject matter jurisdiction is not created by the fact that the NJDEP intervened in the initial proceeding to assert the jurisdictional bar. As the Supreme Court made clear in *SCSPA,* "[a]

State seeking to contest the merits of a complaint filed against it by a private party must defend itself in front of the [agency] or substantially compromise its ability to defend itself at all." *Id.*, 535 U.S. at 762, 122 S.Ct. at 1875.

CONCLUSION

Accordingly, and for the foregoing reasons, NJDEP respectfully requests that the Board deny Hi Tech's Petitions.

Respectfully submitted,



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Department of Environmental Protection

Dated: July 7, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HI TECH TRANS LLC,	:	**Civil Action No. 02-378(DRD)**
Plaintiff,	:	
v.	:	
HUDSON COUNTY IMPROVEMENT AUTHORITY, et al.,	:	**OPINION and ORDER**
Defendants.	:	

This matter comes before the Court upon Plaintiff's motion to amend its complaint pursuant to Fed. R. Civ. P. 15(a), and upon Defendants' cross-motion for a preliminary injunction; and the Court having reviewed the parties' submissions and considered the matters pursuant to Fed. R. Civ. P. 78; and good cause having been shown;

1) and Plaintiff alleging that "with the ICCTA Congress has specifically barred regulation of rail transportation services, including rail intermodal transportation, by State and Local Government" and Plaintiff further alleging "Prior to the passage of the ICCTA, the Interstate Commerce Commission had jurisdiction over trucks used to convey cargo between a railhead and a shipper or consignee as part of intermodal rail-truck transportation services. After the ICCTA the STB has held that it does not have jurisdiction over the trucking element of rail intermodal services. Therefore, the ICCTA has removed the trucking segment of rail intermodal transportation services from regulation by the STB and denied the States and the defendants the authority to impose any regulation on this segment of such transportation"; and Defendants having opposed the motion to amend on the ground that such amendment would be futile and would unduly prolong the proceedings in the instant action; would be subject to dismissal

pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim; and the Court noting that "[i]n the absence of any apparent or declared reason - such as undue delay, bad faith, or dilatory motive. . ." or "undue prejudice to the opposing party by virtue of the amendment . . . leave sought should . . . be freely given" (*Foman v. Davis,* 371 U.S. 178, 182 (1962)); and the Court finding that it would cause undue delay to grant this motion at this time as both parties are aware that this Court has determined that the commerce clause count of this Complaint (Count 2) needs to be heard in an expedited manner in order to resolve Defendants' application for injunctive relief to enforce the municipal ordinances at issue in this case; and the Court further finding that granting the motion to amend at this late date would unduly prejudice Defendants; and the Court further noting that it may deny a party leave to amend a complaint if the proposed amendment would be futile (*See Alvin v. Suzuki,* 227 F.3d 107, 121 (3d Cir. 2000) (citing *Smith v. NCAA,* 139 F.3d 180, 190 (3d Cir. 1998), *rev'd on other grounds,* 525 U.S. 459 (1999))); and the Court further finding that the proposed amendment is futile in that it would not survive a motion to dismiss for failure to state a claim upon which relief could be granted (*Id.*), and the Court further noting that to determine if an amendment would be futile, it should apply the same standard of legal sufficiency as would be applied to a 12(b)(6) motion (*See In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1434 (3d Cir. 1997) (citing *Glassman v. Computervision Corp.*, 90 F.3d 617, 723 (1st Cir. 1996))); and the Court further noting that when considering a motion to dismiss pursuant to 12(b)(6), it shall take all allegations as true and consider them in the light most favorable to the plaintiff (*See Brown v Phillip Morris Inc.,* 250 F.3d 789, 795 (3d Cir 2001)); and the Court determining that Plaintiff's attempt to explain away an adverse decision by the Surface Transportation Board (and its own failure to appeal such decision to the United

States Court of Appeals for the D.C. Circuit)[1] and instead conflate that decision into a new claim in this forum is fruitless, and this Court finding that the STB's decision that Plaintiff is not a rail carrier is conclusive and Plaintiff is therefore collaterally estopped from bringing such a claim under the present guise; and the Court therefore finding that amendment of the complaint will be denied at this time based on undue delay, prejudice to Defendants and futility;

2) and the Court noting that Defendants have filed a renewed motion for a preliminary injunction because "the records show that Hi Tech has not slackened its waste operations at all since being advised by the STB that it has no federal exemption from state and local solid waste laws;" and the Court noting that the grant of injunctive relief is an extraordinary remedy, which should be granted only in limited circumstances *(See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002)); and the Court further noting that to grant a preliminary injunction, a movant must satisfy the following four factors favoring relief: 1) the likelihood that the moving party will succeed on the merits; 2) the extent to which the moving party will suffer irreparable harm without injunctive relief; 3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and 4) the public interest (*See Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995)); and the Court finding that it is unnecessary to reach prongs 1,3 and 4 of the aforesaid test because Defendant has not adequately demonstrated any irreparable harm; specifically, Defendant has not shown the inadequacy of money damages to recompense its losses, if it were to succeed on the merits *(See Weiter v Caesars World, Inc.*, 541 F. Supp. 68, 74 (D.N.J. 1982)) except to the limited extent noted below.

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[1] The Court notes that Plaintiff could have appealed the STB's decision but clearly chose not to do so as a matter of legal strategy.

3) and the Court finding that Defendants' concern set forth in the preliminary injunction motion that "[Plaintiff's] records do not account for or reflect the receipt of contaminated soils that plaintiff is apparently processing, and contain numerous entries that list "NR" or "Not Recorded" under the categories "Origin" and "Type" of waste" is a bonafide issue as to which Defendants have shown a likelihood of success on the merits and irreparable harm in that it is essential that Defendants Hudson County Improvement Authority and Essex County Utilities Authority must know what solid waste is being trucked through their respective streets, and Plaintiff will be ordered to fully comply with such portions of the state and local regulations and shall furnish to Defendants those records that indicate the origin and type of waste that Plaintiff is processing, whether such waste contains contaminates and identify such contaminates. Entries in the records such as "NR" and "Not Recorded" are unacceptable. These records should be produced to Defendants in accordance with Magistrate Judge Hedges's "for attorney's eyes only" protective order until such time as this Court entertains the Appeal of that order.

IT IS on this 1st day of April, 2003,

ORDERED that Plaintiff's Motion for leave to file an Amended Complaint is DENIED; and it is further

ORDERED that Defendants' supplemental motion for a preliminary injunction is GRANTED in part and DENIED in part; and it is further

ORDERED that Plaintiff is required to produce waste receipt records to Defendants that are fully completed in all respects.

HON. FAITH S. HOCHBERG, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HI TECH TRANS, LLC, Plaintiff, v. HUDSON COUNTY IMPROVEMENT AUTHORITY, et al., Defendants.	Civil No. 02-3781 (FSH) Hon. Faith S. Hochberg, U.S.D.J. **ORDER** Date: June 30 2003

HOCHBERG, District Judge:

This matter comes before the Court on an Order to Show Cause entered June 4, 2003, why Plaintiff's Complaint should not be dismissed for lack of standing or of a justiciable case or controversy;[1]

and the Court having reviewed the submissions of the parties and heard oral argument presented on June 11, 2003,

and for good cause having been shown,

and the Court finding that Plaintiff previously withdrew its Preemption Claim contained in Count 1;[2]

---

[1] On May 30, 2003, Defendants HCIA and ECUA submitted its reply brief in support of their motion for summary judgment to the Court. At that time, Defendants notified the Court that the New Jersey Department of Environmental Protection entered an Administrative Order on May 28, 2003, directing Hi Tech to discontinue "its illegal operation of a solid waste facility." In response, the Court issued the Order to Show Cause.

[2] Plaintiff claimed in Count 1 of its Complaint that it has the status of a rail carrier as defined in 49 U.S.C. § 10102(5), under the exclusive jurisdiction and control of the Surface

and the Court finding that Plaintiff's claim set forth in Count 2 does not present a justiciable case or controversy at this time and is therefore dismissed without prejudice;[3]

Transportation Board and is accordingly, "exempt from the application of any state or local law." Hi Tech sought a declaratory order of the Surface Transportation Board ("STB") that they have exclusive jurisdiction over Hi Tech's activities. However, on November 19, 2002, the STB denied the request for a declaratory judgment, finding that "movement of trucks carrying [construction and demolition] debris over New Jersey roads to reach the [Canadian Pacific Railway] transload facility that Hi Tech operates is not part of 'transportation by rail carrier' as defined in section 10501(a)" and therefore 10501(b) preemption does not apply. Hi Tech Trans - Petition for Declaratory Judgment, STB Finance Docket No. 34192. Hi Tech did not appeal this adverse ruling. Accordingly, Hi Tech informed the Court during a conference call earlier this year that Count 1 would be withdrawn. This was reconfirmed during the hearing on the instant Order to Show Cause.

[3] Defendants claim that Plaintiff's Complaint should be dismissed because they lack standing to pursue their Complaint that the counties' order directing waste flow violates the Commerce Clause (as to approximately 30% of the Type 13 waste received by Hi Tech) in light of the DEP's Administrative Order shutting Hi Tech's facility down completely. While the Court agrees that Plaintiff's action should be dismissed without prejudice, the Court finds that the reason for dismissal is more properly characterized as a mootness issue. See Roman v. Bensalem Township, 616 F.2d 680, 684 (3d Cir.1980) ("Inasmuch as mootness would divest us of jurisdiction to consider this appeal, we are obligated to address this issue as a threshold matter."). The United States Supreme Court has acknowledged "mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Monaghan, Constitutional Adjudication: The Who and When, 82 YALE L.J. 1363, 1384 (1973)). Because the DEP has determined that Plaintiff is operating an illegal solid waste facility, Plaintiff's claim that Defendants' County Plans violate the Commerce Clause is now moot. No order in this case can have anything other than an advisory effect unless and until Hi Tech obtains resolution of the DEP shut-down order. In other words, its Commerce Clause claim does not present a redressable grievance at this time. Therefore, this Court lacks jurisdiction over this claim, as well as Plaintiff's § 1983 claims based on the same set of facts, and Plaintiff's Complaint is thus dismissed without prejudice.

and the Court further finding that Count 3, asserted under 42 U.S.C. § 1983 yet premised on the same grounds as Count 1 and Count 2 and presents no different issue, and it will correspondingly be dismissed without prejudice at this time;[4]

and the Court finding that Hi Tech's motion for a preliminary injunction will be denied;[5]

and the Court further finding that HCIA and ECUA's motion for a preliminary injunction will be denied as moot at this time;[6]

---

[4] On May 21, 2003, the Court dismissed Count 3, the tortious interference claim, and the claims against the individual defendants, Thomas P. Calvanico and Mauro G. Tucci. Therefore, with this dismissal of Plaintiff's claims contained in Counts 2 and 4, Plaintiff's remaining counts of the Complaint are dismissed without prejudice.

[5] The Third Circuit has repeatedly held that injunctive relief "is an extraordinary remedy which should be granted only in limited circumstances." See, e.g., Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988). In order for this extraordinary remedy to obtain, a movant must demonstrate: (1) a reasonable probability of success on the merits; (2) that irreparably injury will result if the requested relief is denied; (3) that the hardships balance in favor of the moving party; and (4) the public interest would be advanced by the requested relief. Here, Plaintiff's injunction application fails on the first prong - likelihood of success on the merits - and therefore, the Court need not address any of the other prongs.

[6] Defendants fail to meet the third prong of the test set forth above - irreparable injury. In order to meet its burden of showing irreparable injury, the moving party "must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm." Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989). Insofar as Hi Tech has been shut down by the DEP's Administrative Order, the Counties are not irreparably harmed at this time.

If the Hi Tech facility is reopened, HCIA and ECUA may reapply on 24 hours notice for interim restraints that would prohibit Hi Tech from accepting any type 13 waste originating in either Hudson or Essex Counties. Had the DEP not shut Hi Tech down completely, this Court would have been inclined to grant interim restraints on Count 2 of Defendants' counterclaim, i.e., that Defendants have shown a likelihood of success on the merits (through the full development of facts set forth in the parties' respective motions for summary judgment) that Hi Tech violated the Solid Waste Utilities Control Act and HCIA and ECUA's franchises because the irreparable harm to Defendants and the public's interest significantly outweighed the 30% diminution to Hi Tech's business by not being able to accept type 13 waste from these counties.

and the Court further determining that in fairness to Plaintiff and to promote judicial economy, HCIA and ECUA's Counterclaims should be stayed while such proceedings as may affect the future justiciability of Plaintiff's Commerce Clause claim proceed further;[7]

IT IS on this ____ th day of June, 2003,

ORDERED that Count 1 of Hi Tech's Complaint, previously withdrawn by Plaintiff's counsel, is now **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that Counts 2 and 4 of Hi Tech's Complaint, the Commerce Clause and corollary § 1983 claim are **DISMISSED WITHOUT PREJUDICE** as moot; and it is further

ORDERED that Hi Tech's motion for a preliminary injunction is **DENIED**; and it is further

ORDERED that HCIA and ECUA's counterclaim and third party claims are **STAYED** for a 90-day period to permit the New Jersey State Department of Environmental Protection proceedings and such other proceedings that bear upon the standing issue in this case to proceed; and it is further

ORDERED that HCIA and ECUA's motion for a preliminary injunction is **DENIED WITHOUT PREJUDICE** as moot at this time; and it is further

---

[7] Defendants clearly have standing to bring their counterclaims and third party claims at this time. However, in the interest of judicial economy, the Court will stay Defendants' counterclaims for a period of 90 days. At that time, the Court will take another look at this matter to determine whether Plaintiff's Complaint remains moot. Both parties shall submit a Status Report to the Court on September 30, 2003, which shall address the issues germane to mootness. Defendants seek restraints upon Plaintiff's dissipation of assets during the pendency of the stay, contending that Plaintiff's illegal operations have diverted hundreds of thousands of dollars of revenues belonging to Essex and Hudson Counties. It is ordered that Defendants shall be entitled to take discovery of Hi Tech and its principals during the 90-day period of the stay, including, but not limited to banking and other financial records to determine whether Hi Tech's corporate entity has been used inappropriately by its principals to render the corporate entity undercapitalized and unable to satisfy a money judgment. Defendants may seek documents and depositions upon 10 days' notice. Any discovery disputes shall be brought forthwith to Magistrate Judge Shwartz.

ORDERED that HCIA and ECUA are relieved of Magistrate Judge Hedges's "for attorney's eyes only" Protective Order so that they may proceed with any enforcement actions necessary to enforce county and state laws in state court.

HON. FAITH S. HOCHBERG
UNITED STATES DISTRICT JUDGE

James E. McGreevey
Governor

State of New Jersey
Department of Environmental Protection
Division of County Environmental and Waste Enforcement Programs
Bureau of Solid Waste Compliance & Enforcement
PO Box 407
Trenton, NJ 08625-0407
Telephone: (609) 584-4180 Fax: (609) 588-2444

Bradley M. Campbell
Commissioner

HAND CARRY

May 28, 2003

Hi Tech Trans, LLC
Bay Street
Oak Island Rail Yard
Newark, New Jersey

RE: **Administrative Order**
HI TECH TRANS LLC and DAVID STOLLER

EA ID #: PEA030001 - U131

Dear Mr. Stoller:

Enclosed for service upon you is a(n) **Administrative Order** issued by the Department.

If you have any questions concerning the enclosed **Administrative Order** you may contact Rai Belonzi, Chief, Bureau of Solid Waste Compliance & Enforcement at (609) 584-4180 or by letter at the address above.

Sincerely,

Wolfgang Skacel, Director, CHMM
County Environmental & Waste Enforcement

Enclosure

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
COUNTY ENVIRONMENTAL AND WASTE ENFORCEMENT PROGRAMS
BUREAU OF SOLID WASTE COMPLIANCE AND ENFORCEMENT
300 HORIZON CENTER
P.O. BOX 407
TRENTON NJ 08625-0407
Tel. (609) 584-4180
Fax. 609) 588-2444

James E. McGreevey
Governor

Bradley M. Campbell
Commissioner

IN THE MATTER OF

HI TECH TRANS, LLC and DAVID STOLLER, Individually and in his capacity as Chairman and Chief Executive Officer of HI TECH TRANS, LLC.

ADMINISTRATIVE ORDER

EA ID # PEA030001 - U131

This Administrative Order is issued pursuant to the authority vested in the Commissioner of the State of New Jersey, Department of Environmental Protection (hereinafter "NJDEP" or the "Department") by N.J.S.A. 13:1D-1 et seq., and the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. and the Solid Waste Utility Control Act N.J.S.A. 48:13A-1 et seq., and duly delegated to the Director, Division of County Environmental and Waste Enforcement Programs, pursuant to N.J.S.A.13:1B-4.

FINDINGS

1. HI TECH TRANS LLC, owns and operates a facility located at Bay Street, Oak Island Rail Yard, Newark, Essex County, New Jersey (ID# U131).

2. As the result of a site visit conducted on 04/16/2003, the Department has determined that HI TECH TRANS LLC, unlawfully failed to comply with applicable statutes and regulations of the State of New Jersey as follows:

> Requirement: Pursuant to N.J.A.C. 7:26-2.8(f), "No person shall begin construction or operation of a solid waste facility ["SWF"] without obtaining a SWF Permit unless exempt pursuant to N.J.A.C. 7:26-1.1, 1.7 or 1.8."

Description of Noncompliance: On 4/16/03, DEP investigators obtained records demonstrating, or directly observed, the weighing of solid waste, tipping solid waste from roll-off containers into a roofless structure on the ground (called the "east box"), and then transferring that waste via grapple loader into rail cars. At least 700 cubic yards of ID # 13 and ID # 13C solid waste were observed being processed at the facility on this date. Thus, due to DEP investigators' observations of the receipt, tipping, and reloading of construction and demolition waste, the facility is operating as a solid waste facility. Because the facility does not possess a solid waste facility permit, registration, or engineering design, the facility is an illegal solid waste facility and thus operating in violation of N.J.A.C. 7:26-2.8(f), failure to obtain a SWF permit prior to constructing or operating a solid waste facility.

Requirement: Pursuant to N.J.A.C. 7:26H-1.6(a), "No person shall engage in the business of solid waste collection or solid waste disposal as defined by N.J.S.A. 48:13A-3 unless such person is the holder of a Certificate of Public Convenience and Necessity issued by the Department."

Description of Noncompliance: On 4/16/03, Department representatives observed HI TECH TRANS, LLC to be charging haulers money (a fee) to deposit waste at the facility. Because HI TECH TRANS, LLC possesses neither a Certificate of Public Convenience and Necessity nor a tariff, it is found to be in violation of N.J.A.C. 7:26H-1.6(a), failure to obtain a Certificate of Public Convenience and Necessity prior to engaging in the business of commercial solid waste disposal.

Requirement: The Solid Waste Management Act authorizes the DEP to hold liable any "person" who engages in proscribed solid waste activity. N.J.S.A. 13:1E-9(b)(4). The term "person" is defined by regulation to include "corporate official[s]." N.J.A.C. 7:26-1.4.

Description of Noncompliance: DAVID STOLLER, as Chairman and Chief Executive Officer of HI TECH TRANS, LLC, has actual responsibility for the operation of this illegal solid waste facility and was and is in a position to be able to prevent the occurrence of the violations set forth above but has failed to do so. As such, DAVID STOLLER is in violation of N.J.A.C. 7:26-2.8(f), failure to obtain a SWF permit prior to constructing or operating a solid waste facility; and N.J.A.C. 7:26H-1.6(a), failure to obtain a Certificate of Public Convenience and Necessity prior to engaging in the business of commercial solid waste disposal.

3. As the result of a compliance evaluation(s) conducted on 4/16/03, the Department has determined that HI TECH TRANS LLC, and DAVID STOLLER have violated the laws of the State of New Jersey as follows:

   - Operation of an unpermitted solid waste facility; and
   - Engaging in the commercial disposal of solid waste in New Jersey without having obtained a Certificate of Public Convenience and Necessity.

4. Based on the facts set forth in these FINDINGS, the Department has determined that HI TECH TRANS LLC, and DAVID STOLLER have violated the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., and the regulations promulgated pursuant thereto, specifically N.J.A.C. 7:26-2.8(f), and N.J.A.C. 7:26H-1.6(a).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

5. HI TECH TRANS LLC, and DAVID STOLLER shall, within 20 (twenty) calendar days of receipt of this Order, comply with the following:

   CEASE AND DESIST the operation of the illegal solid waste facility by ceasing to accept, transfer, tip, process, transfer, load or reload solid waste. [N.J.A.C. 7:26-2.8(f)]; and
   CEASE AND DESIST the operation of an uncertificated public utility by ceasing to accept, transfer, or dispose of, solid waste for a fee. [N.J.A.C. 7:26H-1.6]

6. This Order shall be effective upon receipt by HI TECH TRANS, LLC, or any officer or director thereof.

NOTICE OF RIGHT TO A HEARING

7. Pursuant to N.J.S.A. 13:1E-1 et seq., failure to comply with the terms of this Administrative Order may, in addition to any other civil administrative penalty assessed, subject the respondents to forfeiture of any economic benefit which a violator has realized as a result of not complying with, or by delaying compliance with, the requirements of the Act.

8. Pursuant to N.J.S.A. 52:14B-1 et seq., and N.J.S.A. 13:1E-9(e), HI TECH TRANS LLC, and DAVID STOLLER are entitled to request a hearing. HI TECH TRANS LLC, and DAVID STOLLER shall, in their request(s) for a hearing, complete and submit the enclosed ADMINISTRATIVE HEARING REQUEST AND CHECKLIST TRACKING FORM along with all required information. Submission or granting of a hearing request shall not stay the terms or effect of this ORDER.

9. If no request for a hearing is received within twenty (20) calendar days from receipt of this Administrative Order, it shall become a Final Order upon the twenty-first (21st) calendar day following its receipt.

GENERAL PROVISIONS

10. This Administrative Order is binding on HI TECH TRANS, LLC, its principals, directors, officers, agents, successors, assigns, employees, tenants, any trustee in bankruptcy or other trustee, and any receiver appointed pursuant to a proceeding in law or equity. This Administrative Order is binding upon DAVID STOLLER individually and in his capacity as Chairman and Chief Executive Officer of HI TECH TRANS, LLC.

11. This Administrative Order is issued only for the violation(s) identified in the FINDINGS hereinabove. Therefore, be advised that violation of any statutes, rules or permits other than those herein cited may be cause for additional enforcement actions, either administrative or judicial. By issuing this Administrative Order, NJDEP does not waive its rights to initiate additional enforcement actions, including but not limited to the assessment of penalties or other remedies for failure to immediately comply with the requirements of this Order.

12. Neither the issuance of this Administrative Order nor anything contained herein shall relieve HI TECH TRANS LLC, or DAVID STOLLER of the obligation to comply with all applicable laws, including but not limited to the statutes and regulations cited herein.

13. Pursuant to N.J.S.A. 13:1E-9e, NJDEP is authorized to assess a civil administrative penalty of not more than $50,000 for each violation, and each day during which the violation continues shall constitute an additional, separate and distinct offense.

14. Pursuant to N.J.S.A. 13:1E-9f, any person who violates the provisions of N.J.S.A. 13:1E-1 et seq. or any code, rule, or regulation promulgated pursuant thereto shall be liable to a penalty of not more than $50,000 per day to be collected in a civil action, and any person who violates an administrative order issued pursuant to N.J.S.A. 13:1E-9c, including this Administrative Order, or a court order issued pursuant to N.J.S.A. 13:1E-9d, or who fails to pay a civil administrative penalty assessed pursuant to N.J.S.A. 13:1E-9e in full after it is due is subject upon order of a court to a civil penalty not to exceed $100,000 per day of such violations. Each day during which the violation continues constitutes an additional, separate and distinct offense.

15. Pursuant to N.J.S.A. 48:13A-12(b), any person who shall violate any provisions of the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., or the Solid Waste Collection Regulatory Reform Act, N.J.S.A. 48:13A-7 et seq., or any rule, regulation or administrative order adopted or issued pursuant thereto, including an interdistrict, intradistrict or interstate waste flow order, or who shall engage in the solid waste collection or solid waste disposal business without having been issued a certificate of public convenience and necessity, shall be liable to a penalty of not more than $10,000 for a first offense, not more than $25,000 for a second offense and not more than $50,000 for a third and every subsequent offense. Each day during which the violation continues constitutes an additional, separate and distinct offense.

16. Notice is further given that, pursuant to N.J.S.A. 48:13A-12(c), whenever it shall appear to the Department, a municipality, local board of health, or county health department, as the case may be, that any person has violated, intends to violate, or will violate any provision of the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., or the Solid Waste Collection Regulatory Reform Act, N.J.S.A. 48:13A-7.1 et seq., or any rule, regulation or administrative order adopted or issued pursuant thereto, the Department, the municipality, local board of health or county health department may institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate in the circumstances and the court may proceed in any action in a summary manner.

17. Notice is further given that, pursuant to the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., specifically N.J.S.A. 48:13A-12(a), any person or officer or agent thereof who shall knowingly violate any of the provisions of this Act or aid or advise in such violation, or who, as principal, manager, director, agent, servant, or employee knowingly does any act comprising a part of such violation, is guilty of a crime of the fourth degree and shall be punished by imprisonment for not more than 18 months or by a fine of not more than $50,000, or both; and if a corporation by a fine of not more than $100,000. Each day during which the violation continues constitutes an additional, separate and distinct offense.

DATE: May 27, 2003

Wolfgang Skacel, C.H.M.M., Director
Division of County Environmental and Waste Enforcement Programs

Administrative Hearing Request Checklist
and Tracking Form

Document Being Appealed: **EA ID #** PEA030001 - U131

Date Document Issued

Person Requesting Hearing:

Name/Company

Address

Telephone #

Name of Attorney (if applicable)

Address

Telephone #

Please Include the Following Information As Part of Your Request:

The date the alleged violator received the Enforcement Document.
A **copy of the Enforcement Document** and a list of all issues being appealed.
An admission or denial of each of the findings of fact, or a statement of insufficient knowledge;
The defenses to each of the findings of fact in the enforcement document;
Information supporting the request;
An estimate of the time required for the hearing;
A request, if necessary, for a barrier-free hearing location for physically disabled persons;
A clear indication of any willingness to negotiate a settlement with the Department prior to the Department's processing of your hearing request to the Office of Administrative Law; and
This form, completed, signed and dated with all of the information listed above, including attachment, to:

2. New Jersey Department of Environmental Protection
Office of Legal Affairs
Attention: Adjudicatory Hearing Requests
401 E. State Street, P.O. Box 402
Trenton, New Jersey 08625

3. A. Raimund Belonzi, Chief
Waste Compliance and Enforcement & Release Prevention
Bureau of Solid Waste Compliance and Enforcement
P.O. Box 407
Trenton, New Jersey 080625-0407

4. All co-permittees (w/attachments)

IV. Signature:_____ Date:_____

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Attorneys at Law

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* ADMITTED IN MASSACHUSETTS
* ADMITTED IN NEW YORK
^ ADMITTED IN PENNSYLVANIA
□ CERTIFIED CIVIL TRIAL ATTORNEY
○ CERTIFIED CRIMINAL TRIAL ATTORNEY

Please reply to: LYNDHURST

June 17, 2003

HAND DELIVERED

Attn: Adjudicatory Hearing Requests
Department of Environmental Protection
401 East State Street, P.O. Box 402
Trenton, New Jersey 08625-6402

A. Raimund Belonzi, Chief
Compliance and Enforcement & Release Prevention
Bureau of Solid Waste Compliance and Enforcement
Department of Environmental Protection
401 East State Street, P.O. Box 407
Trenton, New Jersey 08625-0407

Re: In the Matter of Hi Tech Trans, LLC and David Stoller,
Administrative Order E.A. ID #PEA030001-U131
Request for Administrative Hearing and
Request for Stay During Pendency of Administrative Hearing

Dear Sir and/or Madam:

On behalf of our client Hi Tech Trans, LLC, we enclose a Request for an Administrative Hearing relating to Administrative Order E.A. ID #PEA030001-U131, dated May 28, 2003, and issued to Hi Tech Trans and David Stoller. The Administrative Order alleges various violations of New Jersey solid waste facility requirements based upon operation of a rail transload facility by High Tech Trans, LLC. Hi Tech Trans, LLC contends that NJDEP's Allegations and Order are arbitrary, capricious and/or unreasonable in that NJDEP is preempted by federal law from regulating rail transload facilities.

Additionally, by this letter Hi Tech Trans and David Stoller request that the requirements of Administrative Order E.A. ID #PEA030001-U131, dated May 28, 2003 be stayed in consideration of the pending Adjudicatory Hearing. In support of the request for a stay of enforcement of the Order, High Tech Trans, LLC submits the following for your consideration:

- Hi Tech Trans, LLC has a high likelihood of success on the merits of the action since NJDEP has, prior to issuance of the Order, acknowledged that the facility is not subject to solid waste facility regulations;
- There is no demonstrable public health impact incident to continued operation of the facility;
- Granting the stay will not have any environmental impacts since NJDEP continues to have the ability to abate risk to public health and the environment notwithstanding the existence of a facility permit.

Based upon the considerations listed above and the information contained in the attached Request for Adjudicatory Hearing, we request a stay of Administrative Order E.A. ID #PEA030001-U131 pending final disposition of all pending adjudicatory actions relative to the Order.

Please note that High Tech Trans, LLC and David Stoller reserve all rights relative to the pending federal judicial action seeking to enjoin operation of the Order and further enjoin NJDEP from enforcing New Jersey solid waste facility requirements against the subject rail transload facility. Nothing in this request for a stay or the attached Request for an Administrative Hearing shall act to waive, admit or otherwise compromise any right to seek a remedy from the federal court.

Thank you for your consideration of this request. We remain available to provide any additional information you require or answer any questions you may have regarding this request.

Respectfully submitted,

ANDREW L. INDECK
For the Firm

Encls.

ADMINISTRATIVE HEARING REQUEST & TRACKING FORM

FOR

ADMINISTRATIVE ORDER E.A. ID #PEA030001-U131

I. Administrative Order Being Appealed:

In the Matter of:	Hi Tech Trans, LLC and David Stoller, Individually and in his capacity as Chairman and Chief Executive Officer of Hi Tech Trans, LLC
	Administrative Order E.A. ID #PEA030001-U131
	Hi Tech Trans, LLC Bay Street Oak Island Rail Yard Newark, New Jersey
Issuance Date:	May 28, 2003

II. Person Requesting Hearing:

Name and Organization:	David Stoller, Chairman Hi Tech Trans, LLC. Bay Street Oak Island Rail Yard Newark, New Jersey
Attorney and Address:	Andrew L. Indeck, Esq. Scarinci & Hollenbeck, LLC 1100 Valley Brook Avenue P.O. Box 790 Lyndhurst, New Jersey 07071-0790 (201) 392-8900

III. Date Alleged Violator Received Enforcement Document:

May 28, 2003.

IV. Issue Being Appealed:

Whether the New Jersey Department of Environmental Protection's (NJDEP's) findings in Administrative Order EA ID #PEA030001-U131 (Order) were arbitrary, capricious and/or unreasonable and are not supported by sufficient, competent, and/or credible evidence in the record, in that NJDEP purports to apply New Jersey solid waste facility permit requirements to a rail transload facility where NJDEP is fully apprised of the fact that application of New Jersey solid waste facility requirements to a rail transload facility is preempted by federal law.

V. Response to Findings of Fact:

1. Hi Tec Trans, LLC (Respondent) denies the allegations of Finding No. 1 except to acknowledge that Hi Tech Trans, LLC operates a facility located at Bay Street, Oak Island Rail Yard (OIRY), Newark, New Jersey (ID # U131).

2. Respondent denies the allegations of Finding No. 2.

3. Respondent denies the allegations of Finding No. 3.

4. Respondent denies the allegations of Finding No. 4.

VI. Defenses to Findings of Fact:

1. Finding No.1 is incorrect in that Respondent is not the owner of a facility located at Bay Street, Oak Island Rail Yard, Newark, New Jersey, but is a licensee of the Canadian Pacific Railroad, which owns said facility.

2. Finding No. 2 alleges: 1) non-compliance with the solid waste facility requirements of New Jersey Administrative Code (NJAC) §7:26-2.8(f); 2) non-compliance with the Certificate of Public Convenience and Necessity requirements of NJAC §7:26H-1.6(a); and 3) that NJDEP may hold David Stoller liable, pursuant to New Jersey Statutes Annotated (NJSA) Sect. 13.1E-9(b)(4), for violations of NJAC §§7:26-2.8(f) and 7:26H-1.6(a). A necessary element of all of these alleged findings – the determination that Respondent's operations at the OIRY fall within the regulatory purview of NJDEP's solid waste facility regulations – cannot be met since rail transload operations are preempted from local regulation by federal law. Consequentially, Finding No. 2 is arbitrary, capricious and/or or unreasonable in that all alleged non-compliance is premised upon application of New Jersey solid waste requirements to a facility that is not subject to such regulations.

3. Finding No. 3 merely restates the allegations of Finding No. 2. Please refer to the defense to Finding No. 2 set forth above.

4. Finding No. 4 alleges violations of the Solid Waste Management Act, the Solid Waste Utility Control Act and NJAC §§7:26-2.8(f) and 7:26H-1.6(a). These allegations are premised upon NJDEP's erroneous finding that Hi Tech's operations may be regulated as a solid waste facility under New Jersey law. For the reasons set forth above in the defense to Finding No. 2, Finding No, 4 is arbitrary, capricious and/or or unreasonable.

VII. Information supporting this Request:

Attached hereto and incorporated into this Administrative Hearing Request, Respondent submits a copy of motion papers submitted in the pending matter Hi Tech Trans, LLC ~~and David Stoller v. Bradley Campbell, et al, Civil Action No. CV-03-2751, (US Dist Ct,~~ NJ) which suit seeks to enjoin NJDEP's enforcement of Administrative Order E.A. ID #PEA030001-U131.

VIII. An estimate of the amount of time required for the hearing:

It is estimated that approximately three (3) days will be required for the hearing.

IX. A request, if necessary, for a barrier-free hearing location for disabled persons:

A barrier-free hearing location for disabled persons will not be required by Hi Tech or David Stoller.

X. A clear indication of any willingness to negotiate a settlement with the Department prior to the Department's processing of your hearing request to the Office of Administrative Law:

Hi Tech, LLC is willing to negotiate a settlement of this matter with NJDEP prior to NJDEP's processing of this hearing request to the Office of Administrative Law.

XI. Attachments included:

(i) Administrative Order Administrative Order E.A. ID #PEA030001-U131 dated May 28, 2003 (Appendix-1);

(ii) Plaintiffs-Appellants' Motion seeking Stay of Enforcement Pending Appeal and an Expedited Appeal for the action Hi Tech Trans, LLC and David Stoller v. Bradley Campbell, et al, Civil Action No. CV-03-2751 (Appendix-2).

This form, completed, signed, and dated with all of the information listed above, including attachments, is submitted to the following:

1. Office of Legal Affairs
Attention: Adjudicatory Hearing Requests
Department of Environmental Protection
401 East State Street, P.O. Box 402
Trenton, New Jersey 08625-6402

2. A. Raimund Belonzi, Cheif
Waste Compliance and Enforcement & Release Prevention
Bureau of Solid Waste Compliance and Enforcement
Department of Environmental Protection
401 East State Street, P.O. Box 407
Trenton, New Jersey 08625-0407

Signature: _____ Date: 6/17/03

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James E. McGreevey
Governor

State of New Jersey
Department of Environmental Protection

Bradley M. Campbell
Commissioner

(609) 292-2885

June 30, 2003

VIA FACSIMILE

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Counsel:

This is the matter of Hi Tech Trans, LLC and David Stoller, Administrative Order No. E.A. PEA-030001-U131, issued May 27, 2003. This letter decision addresses an application for emergency relief filed by Hi Tech Trans, LLC and David Stoller (collectively "Hi Tech") whereby the Administrative Order would be stayed pending resolution of the administrative case.

The procedural history of the matter is as follows. On May 28, 2003, the Office of Solid and Hazardous Waste Compliance and Enforcement in the Department of Environmental Protection (hereinafter the "Office") issued an Administrative Order citing High Tech for operating an unpermitted solid waste facility and engaging in the commercial disposal of solid waste without having obtained a Certificate of Public Convenience and Necessity. The Administrative Order directed Hi Tech to cease and desist operation of the illegal solid waste facility and operation of the uncertificated public utility within twenty calendar days of receipt of the Administrative Order. On June 17, 2003, High Tech requested an administrative hearing and sought a stay from me pending resolution of the

administrative case. On June 24, 2003 the Hudson County Improvement Authority and the Essex County Utilities Authority (hereinafter "Authorities") moved to intervene. On June 25, 2003 the Office filed its papers in response to the stay request.

On June 26, 2003 at 3 p.m., I faxed a letter order to all counsel granting the Authorities' motion for intervention and directing the Authorities and Hi Tech to file any further papers on the motion for a stay by 3 p.m. on Friday, June 27, 2003. The letter order further indicated that I intended to immediately review and rule on the papers.

Both the Authorities and Hi Tech requested extensions of time to provide their submissions. In addition, they objected that they had not been served with each other's papers. As a result, a telephone conference call was held with all counsel. Counsel was directed to immediately complete full service and were given an extension to 9 a.m., Monday, June 30, 2003 to file their papers relating to the stay request.

On June 27, the Authorities intervened in opposition to the stay request. On June 30, 2003 Hi Tech submitted reply papers giving its general agreement on most of the stay conditions proposed by the Office.

The Department must rule at this time. I note that while Hi Tech has requested additional time to brief the stay, it has not offered to withdraw its emergent motion to the federal courts seeking intervention if the Department fails to timely act on this stay request. I further note that the Department, under the scheduling order of the federal court, must file papers later today indicating to the federal court what action I have taken regarding the administrative stay request. In addition, apart from any court proceedings, this Department needs to take timely action on this emergent application. Moreover, the twenty-day grace period built into the Administrative Order of May 27th (during which time the Office indicted it would forebear from taking enforcement action) has expired and the Department must indicate its intention with respect to enforcement.

Therefore, I am issuing an order on emergency relief today and will entertain applications for modifications to, or relief from, that order on a schedule that takes into account the needs of all parties. There is no other practical way to issue a timely ruling and accommodate the requests for time of all the parties.

With regard to emergency relief, it must be noted that the charge against Hi Tech is serious– operating without the necessary approvals from the Department. Illegal facilities have a significant effect not only on customers and nearby residents but and on other participants in the solid waste industry. Illegal facilities interfere with the statutory mandate of the Department and the counties to plan for and police solid waste operations within their jurisdictions. Because these facilities operate outside of the system, in important ways their existence jeopardizes the very integrity of the regulatory system. To grant emergency relief staying the Administrative Order here would risk sending a message to the public and industry that the Department does not take violations of this kind seriously or is not fully committed to enforcement follow through. Nothing could be further from the truth.

Nevertheless, the Department is mindful that there has not yet been a hearing on Hi Tech's administrative claim. Due process counsels that Hi Tech should have this opportunity before the Office enforces its cease and desist order.

Accordingly, while I am not staying the Administrative Order, I am hereby granting emergency relief whereby the Office of Solid and Hazardous Waste Compliance and Enforcement will forbear from seeking judicial enforcement of the Administrative Order for 60 days, on the conditions set forth in the attached order. I find the conditions imposed therein reasonable and appropriate. Operational requirements of this type are commonly included in solid waste facility permits of the type Hi Tech would have sought if it had complied with statute and regulation. It is crucial that the granting of emergency relief herein must not place Hi Tech in a position more advantageous than that of lawfully permitted facilities nor make them exempt them from necessary environmental, health or safety requirements.

Finally, I note that there are certain other issues that have been raised by the parties that, because of the time constraints noted above, are not dealt with in this decision. Counsel is expressly invited to brief those issues when they avail themselves of the opportunity to seek relief from the Order. I note that these issues include, but are not limited to: intervention by the Authorities; confidentiality of Hi Tech's customer lists; scrap metal handling; and paving portions of the site.

By action under separate cover, I will expedite the administrative hearing request so that the administrative process will conclude within the 60-day period established in the order issued today.

Bradley M. Campbell
Commissioner

State of New Jersey
Department of Environmental Protection

James E. McGreevey
Governor

Bradley M. Campbell
Commissioner

IN THE MATTER OF:	ADMINISTRATIVE ORDER DEPARTMENT OF ENVIRONMENTAL PROTECTION
HI TECH TRANS, LLC and DAVID STOLLER, Individually, and in His Capacity as Capacity as Chairman and Chief Executive Officer of HI TECH TRANS, LLC.	EMERGENCY RELIEF EA ID # PEA030001-U131

The Department issued an administrative cease and desist Order on May 27, 2003 in the above-captioned matter ("the cease and desist Order"), which was served upon respondents Hi Tech Trans, LLC ("Hi Tech") and David Stoller (jointly referred to herein as "the respondents"), on May 28, 2003. On June 18, 2003 the respondents requested an administrative hearing and moved for an interim stay of that Order. On June 23, 2003, the respondents submitted an amended motion for interim stay. On June 25, the Department's Office of Solid Waste Compliance and Enforcement ("Office") submitted a letter setting forth its consent to the issuance of an interim stay of enforcement of the Order, but conditioned upon the imposition of certain conditions designed to protect the public health, safety and the environment during the interim stay period. On June 27, the Hudson County Improvement Authority and Essex County Utilities Authority ("Authorities") intervened in opposition to the stay request. On June 30,2003 Hi Tech submitted reply papers giving its general agreement on most of the stay conditions proposed by the Office.

In light of the express consent of the Office to forbear from enforcing the Order, I need not reach the issue of whether High Tech has set forth the necessary elements for an equitable stay. Therefore, after review of the papers, and for good cause shown, the Department has decided to grant emergency relief, but with conditions.

IT IS on this 30th day of Jan, 2003;

ORDERED that the Office of Solid Waste Compliance and Enforcement shall forbear from seeking judicial enforcement of the cease and desist order for a period of 60 days, or until further order of the Department vacating or amending this order for emergency relief, to enable High Tech to obtain appropriate administrative due process on an expedited basis pursuant to the Administrative Procedure Act, during which time High Tech shall comply with the following conditions:

1. Within each twenty-four (24) hour period High Tech shall clean each area where waste has been deposited or stored;

2. No waste shall be stored overnight;

3. The Hi Tech facility property surrounding the actual waste management area shall be maintained free of litter, debris, and accumulations of unprocessed waste, process residuals and effluents. Methods (such as fencing) of effectively controlling windblown papers and other lightweight materials shall be implemented;

4. Methods of effectively controlling dust shall be implemented in order to prevent migration offsite;

5. The operation shall not result in the migration of odors outside the confines of the Hi Tech facility or the emission of air contaminants in violation of N.J.A.C. 7:27-5.2(a);

6. An adequate water supply and adequate fire-fighting equipment shall be maintained to extinguish any and all types of fires. Fire-fighting procedures, including the telephone numbers of local fire, police, ambulance and hospital facilities, shall be posted in and around the Hi Tech facility at all times;

7. High Tech shall effectively control insects, other arthropods and rodents at the Hi Tech facility by means of a program in compliance with N.J.A.C. 7:30, and implemented by an applicator of pesticides, certified in accordance with the New Jersey Pesticide Control Code, N.J.A.C. 7:30;

8. The Hi Tech Trans facility shall, within 30 days of the date of this Order, operate certified scales for the reporting requirements of N.J.A.C. 7:26-2.13 for waste transported by trucks;

9. The queuing and staging of solid waste vehicles on any public roadway is prohibited;

10. The queuing and staging of solid waste vehicles shall be conducted so as to prevent traffic backups and related traffic hazards on access roads servicing the Hi Tech facility;

11. Facilities and all appurtenances, including vehicles while onsite, shall be positioned and buffered in such a manner that sound levels generated by the operation shall not exceed limits established pursuant to the Noise Control Regulations, N.J.A.C. 7:29;

12. High Tech shall not accept or in any manner handle hazardous waste as defined at N.J.S.A. 13:1E-38 or regulated medical waste, as defined at N.J.S.A. 13:1E-48.3. If the Hi Tech facility inadvertently accepts an unauthorized waste type, respondents shall

immediately report the event to the Department's Hotline at 1-877-WARNDEP, and place the waste in a secure area under the Hi Tech facility's control, located a safe distance from active waste areas, until the High Tech receives instruction from the Department as to the proper disposal of the waste.

13. Solid waste shall not remain at the Hi Tech facility for more than 24 hours.

14. Effective security procedures shall be implemented to control entry and exit at all times.

15. The Department's designated representatives and inspectors shall have the right to enter and inspect any building or any other portion of the respondents' facility, at any time. This right to enter and inspect includes, but is not limited to:

(1) Observing and sampling any materials on site;

(2) Photographing any portion of the Hi Tech facility, solid waste vehicles, containers, and container contents;

(3) Investigating an actual or suspected source of pollution of the environment;

(4) Ascertaining compliance or non-compliance with the statutes and regulations of the Department; and

(5) Reviewing and copying all records that are required to be maintained by federal or state law, which shall be made available on request to Department representatives and inspectors at all reasonable times for review and inspection.

16. Any release or discharge of any solid waste at the Hi Tech facility shall be immediately reported by High Tech or their designee to the DEP Emergency Response 24-hour Hot Line at 1-877-WARNDEP. The report shall specify the type of substance discharged and the estimated quantity, the nature of the discharge, the location of the

discharge, any action being taken or proposed to be taken in order to mitigate the discharge, and any other information concerning the incident the Department may request at the time of notification.

17. High Tech shall designate an on-site emergency coordinator who will be available during all hours of operation for the purpose of handling emergency situations such as, but not limited to, spills, discharges or releases of solid wastes at the Hi Tech facility.

18. Only solid waste vehicles properly registered, pursuant to N.J.A.C. 7:26-3, with the Division of Solid and Hazardous Waste, unless exempt from the registration requirement pursuant to N.J.A.C. 7:26-3.3, and displaying the appropriate registration number and solid waste decal shall be admitted for loading and unloading of any solid waste at the Hi Tech facility. Hi-Tech shall comply with all requirements of applicable District Solid Waste Management Plans unless an order to the contrary is issued by the Department or a court of competent jurisdiction.

19. The Hi Tech facility shall not receive, store, handle, process or transfer waste types other than ID # 13 and ID # 13C, as defined pursuant to N.J.A.C. 7:26-2.13(g).

20. High Tech shall provide a means of removing mud, solid waste or other debris from the tires of all vehicles. Vehicle tires shall be cleaned prior to the vehicle's departure from the Hi Tech facility's boundaries.

21. The Hi Tech facility shall, within no later than 30 days of the date of this Order, install and properly maintain a system that collects, stores, and properly disposes of wastewater generated during normal operations, including wash-out and cleaning of equipment, trucks and floors, in compliance with the applicable rules regarding wastewater and storm water management at N.J.A.C. 7:14A;

22. On all onsite roadways and storage areas subject to vehicle loading and unloading, Hi Tech shall, no later than 30 days from the date of this Order, undertake reasonable measures to reduce dust and prevent pollutants from seeping into the soils. The measures taken need not be by concrete or asphalt paving, unless subsequently ordered to the contrary.

23. Failure to operate in compliance with the requirements of this agreement shall be subject to all applicable penalties pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and N.J.A.C. 7:26-5, and shall be cause for reconsideration and possible vacation or amendment of this Order.

24. High Tech shall comply with the following record keeping and reporting requirements:

i. The Hi Tech facility shall maintain a daily record of wastes received. The record shall include the information specified in N.J.A.C. 7:26-2.13(a);

ii. The daily record shall be maintained, shall be kept, and shall be available for inspection in accordance with N.J.A.C. 7:26-2.13(b);

iii. The Hi Tech facility shall verify, retain, and make available for inspection a waste origin/disposal (O and D) form for each load of solid waste received in accordance with N.J.A.C. 7:26-2.13(c).

iv. High Tech shall submit monthly summaries of wastes received to the Division of Solid and Hazardous Waste, Bureau of Recycling and Planning, on forms provided by the Department (or duplicates of same), no later than 20 days after the last day of each month. The monthly summaries shall include the information specified at N.J.A.C. 7:26-2.13(e).

High Tech is ordered to file with the Department an affidavit within 10 days of the date of this Order attesting to their compliance with all of the conditions set forth above except those in paragraphs 8, 21, 22, 23 and 24. High Tech shall be required to file with the Department an affidavit within 35 days of the date of this Order attesting to compliance with all of the conditions set forth in paragraphs 8, 21, and 22.

By issuing this order for emergency relief, the Department is not in any way recognizing Hi Tech as a facility lawfully authorized to handle, receive, process, collect or dispose of, solid waste. Specifically, nothing in this Order shall preclude the Department or any of its lawful agents, including but not limited to those under the County Environmental Health Act, from prosecuting any solid waste hauler or transporter for failure to dispose of solid waste at a lawfully authorized solid waste facility.

Nothing within this Order shall be interpreted as implying that the interim conditions set forth herein are an effective substitute for, or are in any way as protective of the public health, safety and the environment as, the lawful permitting and licensure processes under the Solid Waste Management Act and the Solid Waste Utility Control Act. Nor shall this Order in any way preclude the Department from imposing more stringent standards upon respondents as the public health, safety and welfare require.

Bradley M. Campbell
Commissioner

Dated: June 30 2003

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HI TECH TRANS, LLC, Plaintiff, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendant.	Civil No. 03-2751 (FSH) Hon. Faith S. Hochberg, U.S.D.J. **ORDER** Date: June 16, 2003

HOCHBERG, District Judge:

This matter having come before the Court upon Plaintiff, Hi Tech Trans's Emergent Order to Show Cause with Temporary Restraints;

and the Court noting at the outset that the exigent circumstances of this action have come about entirely through Plaintiff's own actions and inactions;[1]

[1] The instant Order to Show Cause was submitted to the Court by mail some 10 days after the DEP made its ruling, rather than having been filed in any manner seeking true emergent relief. The Court held a prompt hearing on the request nonetheless. At the hearing, Plaintiff represented that sometime last year it petitioned to the Surface Transportation Board ("STB") for a decision regarding whether activity at the Hi Tech facility is part of intermodal rail transportation. The STB, in its November 19, 2003 decision, determined that transportation of construction and demolition ("c&d") debris by truck to the Hi Tech facility is not an integral part of rail transportation. In what can best be described as equivocal dicta, the STB further stated "the only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be transfer of C&D debris from trucks to rail cars at the Canadian Pacific Railway transload facility itself." Surface Transportation Board Decision, Finance Docket No. 34192 at p. 4. Plaintiff never sought any further relief or clarification of this statement by the STB in the 7 months after the ruling. Rather, it chose to do nothing until such time as the DEP ordered it to shut down with full knowledge that it was facing this likelihood.

and it appearing that Plaintiff seeks to enjoin the enforcement of the DEP's Administrative Order of May 27, 2003, in which it determined that Plaintiff is operating an "illegal solid waste facility" because it has failed to obtain the necessary permits for such a facility and ordered that Plaintiff cease and desist operation of such illegal facility within 20 days of receipt of the Administrative Order;[2]

and it appearing that the Court has reviewed the many submissions of the parties and heard oral argument presented on June 11, 2003;

and the Court finding that, under the Eleventh Amendment, a plaintiff other than the United States or a state may not sue a state in federal court without the latter state's consent unless Congress abrogates the state's Eleventh Amendment immunity pursuant to a constitutional provision granting Congress that power. See Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996);

and the Court further finding that the United States Supreme Court's decisions in Ex parte Young, 209 U.S. 123 (1908) and Verizon Maryland Inc., v. Public Service Commission of Maryland, 535 U.S. 635, 645 (2002), cited by Plaintiff, do not control here, as those cases involved suits against state commissioners in their official capacities;

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[2] Plaintiff presents the novel argument that, as a licensee of CP, it is an integral part of rail transportation and is not subject to state and local permitting rules because this particular area has been preempted by the ICCTA, and that therefore, the DEP does not have the authority to make it obtain permits or shut it down. (Interestingly, it concedes that in all other areas related to health and safety, this area has not been preempted and that therefore, the DEP can regulate it.)

In this case Plaintiff asks this Court to make a determination that its solid waste facility is an integral part of rail transportation. Yet, in a related action also before this Court, Hi Tech Trans v. HCIA, et al., 02-3781, Plaintiff contends that this Court does not have the authority to make this determination because the STB has the exclusive authority to do so. See June 10, 2003 letter of John McHugh, counsel for Plaintiff in 02-3781.

and the Court noting that Plaintiff was put on notice at the hearing on June 11, 2003 that one possible way to cure the 11th Amendment defect would be to amend its Complaint to name a DEP official;

and the Court noting that if, and when, Hi Tech files an action against an individual acting in his/her official capacity, this Court will promptly address the Burford and Younger abstention doctrines as they relate to the issues in this case;

and the Court noting that Plaintiff has not availed itself of its right to request an administrative hearing from the DEP, nor a stay from the DEP, nor any of the other relief accorded by the New Jersey Superior Court despite ample notice of the availability of those remedies since the DEP's May 27, 2003 ruling;

IT IS on this 16th day of June 2003,

ORDERED that Plaintiff's Complaint is barred by the U.S. Const. 11 Am. and is therefore **DISMISSED**; and it is further

ORDERED that Plaintiff's Motion for a Preliminary Injunction is accordingly **DENIED.**[3]

HON. FAITH S. HOCHBERG
UNITED STATES DISTRICT JUDGE

[3] Because of this Court's ruling that the entire action is barred by the 11th Amendment, it is unnecessary to address the parties' arguments for and against injunctive relief on the merits.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HI TECH TRANS, LLC, and DAVID STOLLER, Plaintiffs, v. BRADLEY M. CAMPBELL, COMMISSIONER OF THE STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and WOLF SKACEL, DIRECTOR OF WASTE COMPLIANCE AND ENFORCEMENT AND RELEASE PREVENTION, STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendants.	Civil No. 03-2751 (FSH) Hon. Faith S. Hochberg, U.S.D.J. **ORDER** Date: June 20, 2003

HOCHBERG, District Judge:

This matter having come before the Court on short notice upon Plaintiffs', Hi Tech Trans LLC and David Stoller ("Hi Tech" or "Plaintiffs"), renewed request for an Order to Show Cause with Temporary Restraints seeking, inter alia, to enjoin the administrative enforcement proceeding of the New Jersey Department of Environmental Protection ("DEP"), which issued an Order May 27, 2003 declaring Hi Tech to be "an illegal solid waste facility" and ordering that it cease and desist its illegal operations;

and the Court noting that Plaintiffs have filed an Amended Complaint for declaratory judgment[1] naming two new Defendants;[2]

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[1] Hi Tech's Amended Complaint seeks a declaratory judgment that an administrative agency with jurisdiction over interstate rail transportation ("the Surface Transportation Board" or

and the Court having immediately granted a hearing on short notice in the matter;

and the Court having considered all of the submissions of the parties;

and the Court having had oral argument on the matter on June 11, 2003;

and for good cause having been shown;

and the Court finding that the doctrine of Ex parte Young permits Plaintiffs' Amended Complaint to proceed against these new Defendants in their official capacities because Plaintiffs allege an ongoing violation of federal law and seeks only prospective relief;[3]

and the Court further declining to enjoin the enforcement of New Jersey's state environmental laws and regulations and abstaining from entertaining the instant action due to considerations of federalism and comity[4] based upon its determination that both

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"STB") has exclusive jurisdiction over Hi Tech, notwithstanding that Hi Tech is neither a rail carrier nor a subsidiary of a rail carrier but rather is a licensee of CP Railway which has not appeared in the action. Hi Tech seeks a declaratory judgment that Hi Tech is exempt from New Jersey DEP's permitting and licensing regulations, as well as a declaratory judgment that the state environmental protection agency cannot enforce "any [of its own regulations] against Plaintiffs unless that action has been authorized by the Surface Transportation Board." Amended Complaint, p. 11.

[2] Plaintiffs have amended its Complaint to name Bradley A. Campbell, the Commissioner of the State of New Jersey Department of Environmental Protection, and Wolf Skacel, Director of Waste Compliance and Enforcement and Release Prevention, State of New Jersey Department of Environmental Protection.

[3] In Ex parte Young, the United States Supreme Court held that the Eleventh Amendment does not bar a suit for prospective injunctive relief when a litigant alleges a state officer violated federal law. Ex parte Young, 209 U.S. 123 (1908); see also Verizon Maryland Inc., v. Public Service Commission of Maryland, 535 U.S. 635, 645 (2002) (in determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a federal court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective).

[4] In Younger v. Harris, 401 U.S. 37, 41 (1971), the United States Supreme Court articulated some of the principles and policies that underlie the "notion of 'comity'" that exists

Younger[5] and Burford[6] abstention doctrines should be applied in the instant case;[7]

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between our national and state governments. This

> notion of "comity" . . . is [] a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44-45.

[5] Younger v. Harris, 401 U.S. 37, 41 (1971). In Middlesex County Ethics Committee v. Garden State Bar Ass'n., the Supreme Court set forth a three-step test a court should utilize when determining whether abstention under Younger is appropriate: (1) there must be an ongoing state proceeding that is judicial in nature; (2) the state proceeding must implicate important state interests; and (3) the state proceeding affords an adequate opportunity to raise federal claims. 457 U.S. 423, 432 (1982).

Applying these factors to the instant case, this Court finds that abstention is warranted on Younger grounds because: (1) there is a state administrative proceeding currently pending which is judicial in nature, see Ohio Civil Right Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986); (2) New Jersey has a highly significant state interest in the regulation of its solid waste facilities, see N.J.S.A. 13:1E-2(a); and (3) the DEP and the appellate courts of New Jersey provide an adequate opportunity for Hi Tech to raise all of its federal claims.

[6] In Burford v. Sun Oil Co., 319 U.S. 315 (1943), the United States Supreme Court recognized that federal abstention is appropriate to defer to comprehensive state administrative procedures. The Supreme Court has provided a clear definition of the Burford doctrine:

> Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance

transcends the result in the case at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989). With respect to the first prong above, New Jersey's environmental regulations are clearly comprehensive and serve to ameliorate the important policy problems of public health, welfare and safety relating to the storage and disposition of solid waste. In addition, the importance of the issues at stake in the DEP action with Hi Tech transcend the results in that case. Plainly stated, if solid waste facilities can immunize themselves from state environmental licensing regulations through the opportunism of locating themselves near a railroad and using rail transportation, the comprehensive regulatory scheme established to protect the environment and public health and safety may well be seriously eroded. Moreover, this Court's intervention into the State's comprehensive regulatory scheme of solid waste facilities would undermine state efforts to adopt a coherent and complete policy with respect to an area of such grave public concern.

In addressing the second prong of this test, three issues must be addressed: (1) whether the particular regulatory scheme involves a matter of substantial public concern; (2) whether it is "the sort of complex, technical regulatory scheme to which the Burford abstention doctrine usually is applied"; and (3) whether review of a party's claims would interfere with the state's efforts to establish and maintain a coherent regulatory policy. Chiropractic America v. Lavecchia, 180 F.3d 99, 104 (3d Cir. 1999). There can be no doubt that a state endeavoring to minimize the risks of environmental pollution is a matter of grave public concern. Indeed, the Legislature found in formulating the Solid Waste Management Act that "solid waste is a matter of grave concern, which is thoroughly affected with the public interest." N.J.S.A. 13:1E-2; see also N.J.S.A. 48:13A-2 (finding disposal of solid waste a matter of grave concern, which is also thoroughly affected by the public interest). In response to such findings, the DEP and New Jersey State Legislature have developed a complex technical regulatory scheme, the kind to which Burford abstention is usually applied. This Court also finds that its intervention into an administrative enforcement proceeding of New Jersey's comprehensive environmental regulation scheme would seriously undermine New Jersey efforts to establish and maintain a coherent and uniform regulatory policy. Timely and adequate state court review of state administrative action is available in the Superior Court of New Jersey. Hi Tech can seek emergent relief through the state's administrative and judicial forums because all administrative action is subject to careful review in the state courts, which can rule upon issues of both state and federal law. Although Hi Tech is now seeking relief on short notice, it can also do so in the state courts. Moreover, the emergency is of Hi Tech's own making, in that its dispute with the state authorities has been simmering for over a year, during which time Hi Tech sought a formal opinion from the STB on certain issues and sought no reconsideration nor any judicial relief when the STB opined adversely to Hi Tech on November 19, 2002 as to one related issue and declined to reach the issue presented here.

and the Court further exercising its discretion not to entertain a suit that seeks solely a declaratory judgment;[8]

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[7] Plaintiffs argue that this Court should not abstain because Hi Tech is seeking a declaratory judgment that federal law preempts the New Jersey Department of Environmental Protection's Order dated May 27, 2003. Plaintiffs rely on Ford v. Insurance Commissioner of the Commonwealth of Pa., 874 F.2d 926 (3d Cir. 1989), among other cases, for this proposition. In Ford, the United States Court of Appeals for the Third Circuit, stated:

> [i]n this case, as in Kennucky West [Va. Gas Co. V. Pa. Public Utility Comm'n, 791 F.2d 1111 (3d Cir. 1986)], we note that there is no absolute rule in prohibiting the application of Younger abstention doctrine whenever the Supremacy Clause is invoked. See Kennucky West, 791 F.2d at 1117 ("[i]t would . . . be an overstatement to suggest that Younger abstention is never appropriate when the question presented is one of preemption.") The presence of a claim of preemption in such cases, however, requires review of the state interest to be served by abstention, in tandem with the federal interest that is asserted to have usurped the state law.

Id. at 934. While in Ford, the Third Circuit found that no beneficial purpose would be served by the district court's abstention, the analysis in this case reaches a different result. While the federal interest in regulating interstate railroads is indeed strong, the federal interest in this case is vitiated at least in part by the unprecedented claim of Hi Tech to be treated as a "railroad," when it is in fact a solid waste transfer station operating pursuant to a license from a railroad. Despite ample opportunity to acquire rail carrier status, it has failed to do so. Indeed, on July 3, 2000, Hi Tech filed a Notice of Exemption in accordance with 49 C.F.R. § 1150.32 in an attempt to "commence common carrier rail service" over 641 miles of Canadian Pacific rail track. See Hi Tech Trans, LLC - Operation Exemption - Over Lines Owned By Canadian Pacific Railway and Connecting Carriers, Finance Docket No. 33901. Hi Tech withdrew its Notice of Exemption on July 17, 2000, and has never obtained status as a rail carrier.

Balancing this rather attenuated federal interest against the interests of the State of New Jersey, there is a well-recognized compelling state interest in the DEP's enforcement of its own environmental laws especially as to the uniquely vexing problem of solid waste facilities in a densely populated state that has suffered the scourge of unregulated solid waste facilities for decades. Upon balancing the state and federal interests in this case, this Court reaches a different conclusion then that reached in Ford. Accordingly, this Court will abstain from entertaining Plaintiffs' Amended Complaint and will exercise its discretion not to grant the declaratory relief sought by Hi Tech.

[8] 28 U.S.C. § 2201; State Auto Ins. Companies v. Summy, 234 F.3d 131 (3d Cir. 2000) (finding that district court should have declined to exercise its discretion to entertain declaratory judgment action in light of pending state case involving same issues).

IT IS on this 20th day of June 2003,

ORDERED that Plaintiffs' Amended Complaint is **DISMISSED**; and it is further

ORDERED that Plaintiffs' Motion for a Preliminary Injunction is accordingly **DENIED**;[9] and it is further

ORDERED that this case is **CLOSED**.

HON. FAITH S. HOCHBERG
UNITED STATES DISTRICT JUDGE

[9] The Court need not address the parties' arguments for and against injunctive relief on the merits because it has decided to abstain from entertaining this action.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 18, 2003
#A-111-E

No. 03-2773

HI TECH TRANS, LLC, et al., Appellants

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION

(N.J.-Newark Civil No. 03-cv-02751)

Present: SLOVITER and McKEE, Circuit Judges.

1) Emergency Motion by Appellants, Hi Tech Trans, LLC, et al., for stay of enforcement pending appeal and for expedited appeal.

   Appellants' brief and appendix to be filed and hand-served by June 20, 2003; and Appellee's brief to be filed and and-served by June 25, 2003.

2) Response by Appellee, State of New Jersey, Department of Environmental Protection, in opposition to emergency motion for stay of enforcement pending appeal.

3) Document entitled "Declaration of Ronald S. Feehan" which the Court may wish to construe as an exhibit in support of response in opposition by Appellee.

Gayle Burr 267-299-4921
Case Manager

See Court's Order dated June 17, 2003.

ORDER

The foregoing emergency motion for a stay pending appeal is denied for the reasons given by the District Court. This order is without prejudice to presentation of the appellants' motion for a stay to the District Court on

the basis of the amended complaint after it has been properly filed and served. The appellants' motion for an expedited briefing schedule is granted with the Clerk of the Court to set a briefing schedule after consultation with the parties.

By the Court,

Circuit Judge

Dated: JUN 2 0 2003

cc: ALI
JHM

TOTAL P.03

TRANSPORTATION AGREEMENT

THIS AGREEMENT made this 6th day of ~~October~~ November, 2000 by and between HI TECH TRANS, LLC, a limited liability corporation of the State of New Jersey, (hereinafter referred to as "HTT"), and the DELAWARE AND HUDSON RAILWAY COMPANY, INC. a Delaware corporation. , doing business as CANADIAN PACIFIC RAILWAY (hereinafter the "Railroad").

RECITALS:

WHEREAS, pursuant to an Operational License Agreement ("License Agreement") executed by the parties herein, HTT desires to transfer non-hazardous Waste Products, as defined below, from truck to rail at portions of the Railroad's Oak Island Intermodal Facility in Newark, New Jersey (the "Premises");

WHEREAS, upon transfer, the Waste Products will be transported by Railroad to disposal sites and

WHEREAS, that in order to effectively and efficiently transport Waste Products, Railroad must provide consistent and timely service and will make best efforts to do so; and

WHEREAS, the parties further recognize that such consistant and timely service may be constrained by circumstances beyond its control; and

WHEREAS, the parties hereto desire to enter into an agreement for the transportation by Railroad for HTT. Specific rates, origins, destinations and other transportation particulars are detailed in Appendices attached or reference hereto; and

NOW, THEREFORE, in consideration of the terms and conditions set forth herein the parties do hereby agree as follows:

1. **TRANSPORATION SERVICES.** Pursuant to the terms set forth herein, Railroad will provide HTT, and HTT will use rail transportation for the movement of Waste Products between Oak Island and disposal sites on or near the Railroad's network or to points of interchange with other rail carriers. Unless otherwise agreed, Waste Products will be transported from origin at the Premises to destinations via the routes identified at the attached Exhibit A as amended from time to time. For purposes of this Agreement, the term "Waste Products" shall mean Construction and Demolition Waste (STCC Code 40-291-54), Municipal Solid Waste (STCC Code 40-291-73), Contaminated Soils (STCC Code 40-291-01), Contaminated Soils (STCC Code 40-291-02 and Bio-solids (STCC Code 40-291-89).

2. **TERM.** The term of this Agreement shall be for twenty (20) years as set forth by the parties hereto in the License Agreement.

3. **TERMINATION.** Railroad shall have the right to terminate this Agreement in the event HTT fails to tender the contract volumes described in Section 8 of this Agreement for a

period of two years or if the Operational License Agreement, dated November 6, 2000 between the parties is terminated for any reason. . In the event of any substantial failure on the part of either party to perform its obligations under this Agreement and the continuance of such default for a period of thirty (30) days after written notice of such default either delivered by hand or by certified mail or electronic transmission, from the non-defaulting party, the non-defaulting party will have the right, at its option, after first giving an additional thirty (30) days written notice, and notwithstanding any waiver of the non-defaulting party thereof, to terminate this Agreement. The exercise of such right shall not impair the non-defaulting party's rights under this Agreement or any cause of action it may have against the defaulting party to recover damages.

4. **RAILROAD CONTROL OF TRANSPORTATION SERVICES.** Railroad shall have sole and exclusive control over the manner in which it and its employees and subcontractors perform transportation services. Railroad will engage and employ and/or subcontract such persons, as it deems necessary in connection with services provided herein. As between Railroad and HTT, such persons will be considered employees or subcontractors of the Railroad only and, to the extent they are employees will be subject solely to the employment, discharge, discipline and control of the Railroad. Railroad will be fully responsible for the acts and omissions of its subcontractors to the extent such acts, and omissions are conducted in furtherance of this Agreement.

5. **RATES & CHARGES; PAYMENT.** Transportation Services provided by Railroad for HTT will be at Railroad's normal, customary and compensatory rates, however, to the extent controlled by Railroad, such rates shall not be more than rates charged by similarly situated rail carriers providing similar services. As to existing identified sites, rates are as identified and set forth in Schedule A, attached hereto and made a part hereof. Rates charged pursuant to this Agreement do not include demurrage and other ancillary charges which may be charged to HTT or its consignees pursuant to tariff by Railroad. Rates will be adjusted annually in accordance with adjusted RCAF. Any dispute as to rates shall be resolved pursuant to Section 28.

All bills, invoices and/or fees charged under this Agreement shall be paid within thirty (30) days from the date of the invoice. Any discrepancy in billing or charges assessed under this Agreement shall be reconciled between the parties and shall be paid or credited in the following invoice. If HTT disputes any portion of a Railroad invoice, it shall nevertheless pay such Railroad invoice, in full, subject to adjustment upon resolution of the dispute. Any claim for adjustment or correction of any Railroad invoice which is not made in writing and delivered to Railroad within six (6) months of the date upon which such Railroad invoice was issued shall be deemed waived by HTT.

6. **GOVERNING CONDITIONS:** Except as otherwise provided in this Agreement, transportation shall be governed by tariff provisions and other rules and regulations, including amendments supplements thereto, which would apply if this Agreement were not in effect, including the Uniform Straight Bill of Lading in the case of carload shipments and CPR Exempt Circular 7000 in the case of Intermodal Shipments. In the event any such terms conflict with the terms of this Agreement, the terms of this Agreement shall govern. If any such provision, rule or

regulation should be cancelled or otherwise become inapplicable, the last published provision, rule or regulation shall govern until such time as the parties mutually agree to other terms. Except as otherwise provided in this Agreement, inspection, diversion, reconsignment and transit privileges shall not be permitted nor shall this Agreement be subject to intermediate application at origin or destination.

7. **RAILROAD SERVICE RESPONSIBILITIES**. Unless otherwise agreed:

(a) Any deviation from the routes caused by Railroad will be the responsibility of the Railroad and at no time will result in additional cost to HTT.

(b) Railroad will provide locomotive power for the movement of HTT traffic from origin to destination or interchange.

(c) Railroad's liability for transit performance shall be limited to the remedies described herein, and in no event shall either party be responsible to the other for any consequential, exemplary, or punitive damages, except to the extent expressly and specifically set forth in this Agreement.

8. **HTT SERVICE RESPONSIBILITIES.** Unless otherwise agreed:

(a) HTT shall provide its own cars dedicated to the movement of HTT traffic. Railcars must be in good condition and provide protection to maintain the quality of their lading.. HTT owned or leased equipment used under this Agreement will be subject to prior approval of the Railroad's Mechanical Department, which approval shall not be unreasonably withheld. The HTT will provide maintenance for such equipment except that, as necessary to provide running repairs, Railroad may repair enroute and bill the HTT in accordance with current Association of American Railroads (AAR) Intermodal Rules or HTT repair standards.

(b) DAMAGE TO EQUIPMENT:

(1) In the event damage to HTT owned or leased equipment is caused solely by the intentional or negligent act or omission or misconduct of Railroad, Railroad shall, within five (5) business days, at its expense to the extent such damage was caused by Railroad, arrange for movement of the equipment to a HTT terminal or repair shop served by the Railroad and designated by HTT for reasonable repair costs. In the event that HTT's equipment is damaged beyond repair by the Railroad, the Railroad shall pay to HTT the current fair market value of the equipment using AAR Intermodal depreciated value formula.

(2) If damage to HTT owned, Railroad owned or leased equipment is caused in whole or in part, by the intentional or negligent act or omission of HTT (including but not limited to improper loading or weight distribution or HTT's equipment failure), HTT will reimburse the Railroad for the Railroad's costs and expense of moving damaged equipment to the designated repair site. If the total cost of the repair will not exceed the current value of the equipment and HTT elects to repair, the costs of repair shall be apportioned between HTT and the Railroad according to their respective share of the damage provided that the Railroad's negligence contributed to the damage. If the Railroad's negligence did not contribute to the damage, the costs of repair shall be borne solely by HTT.

(3) INSPECTION: Whenever there is damage for which the Railroad will be held liable, HTT will notify the Railroad and the Railroad, at its option, may jointly inspect equipment with HTT. This option must be exercised within 10 days of notification from HTT.

(c) EQUIPMENT COMPLIANCE: All equipment used to transport the Waste Products pursuant to this Agreement shall comply with AAR and American National Standard Institute (ISO) specifications as well as all applicable federal, state and local laws, rules, regulations, permits and licenses, provided that compliance therewith shall in no way relieve any party from any liabilities otherwise assumed pursuant to this Agreement. It shall be the responsibility of the party providing the equipment in any case to assure such compliance.

(d) HTT shall maintain its cars and agrees to indemnify, defend and hold Railroad (including its officers, directors and employees) harmless from and against any and all liabilities, damages, fines, defects, penalties-including FRA fines and penalties, costs, claims, demands and expenses (including costs of defense, settlement and reasonable attorneys' fees) including (a) increased transportation charges or liability, (b) damage or destruction of any property, or (c) injury (including death) to any person arising out of any act or omission by HTT, including its employees and subcontractors ; or the failure of HTT, its employees or subcontractors to comply with this Agreement or any applicable law, regulation, ordinance, or government directive regarding the rail cars that may directly or indirectly regulate or affect the obligations of herein.

9. **DELIVERY; DELAYS; MISROUTINGS.** In the event of a diversion or delay of HTT's equipment which results in a delay in the return of empty equipment exceeding the capacity of spare equipment to be maintained by HTT pursuant to each transportation agreement, to accommodate anticipated delays, which diversion or delay is attributable to Railroad and not to a connecting carrier, Railroad will use its best efforts to cover HTT's requirements at railroads reasonable cost by obtaining such suitable equipment as may be available to it and providing it to HTT. Should, under such circumstances, HTT not be able to load cars provided by Railroad to the tonnage upon which the carload rate is established , CPR's division of revenues will be reduced proportionately and the difference will be refunded to HTT. HTT will not be charged per-diem on such equipment but will be responsible for demurrage if such equipment is delayed beyond free time while in HTT's service. Should such a delay be attributable to a connecting carrier, Railroad will use its best efforts to obtain suitable equipment to cover HTT's requirements but all costs incurred in that regard shall be born by HTT except that in such event the per car charges for transportation will be adjusted proportionally as dictated by the load limits of the equipment made available.

Where a delay or diversion occurs which is not attributable to any fault on the part of Railroad, nothing in this agreement shall preclude HTT from pursuing any remedy it may have at law or otherwise against any connecting carrier or other entity.

10. **TENDER OF SHIPMENT**: Each tender of Waste Products shipment shall be made on a Uniform Straight Bill of Lading for either carload or Intermodal container shipments, as applicable in the specific case, subject to the terms and conditions of this Agreement. To the extent possible, each Bill of Lading shall contain the ICC Agreement Number assigned to this Agreement; however, any inadvertent omission shall not be deemed a breach thereof.

11. **LIABILITY**: Except as provided elsewhere in this Agreement, liability for loss and damage shall be governed by the provisions of 49 U.S.C. Section 11707 and the terms and conditions of the Uniform Straight Bill of Lading for carload shipment, and the CPR Exempt

Circular 7000 and its amendments for container/trailer shipment, in effect on the date the loss or damage occurred..

12. LOADING AND UNLOADING OF LADING:

(a) COMPLIANCE WITH LOADING RULES: HTT shall have the sole responsibility, at its sole expense, for properly packaging, labeling, marking, blocking, bracing, placarding, and loading and unloading the Waste Products to or from equipment to be transported pursuant to this Agreement. HTT shall comply with the loading rules of the AAR and applicable federal, state and local loading rules or other loading rules as modified to meet the needs of HTT, subject to approval of the Railroad as well as applicable federal, state and local requirements regarding the handling of the Waste Products. HTT shall further be responsible for insuring that the load limits of any equipment used for transporting the Waste Products under this Agreement are not exceeded.

(b) OVERLOADED OR IMPROPERLY LOADED EQUIPMENT: In the event it is discovered that equipment has been overloaded or improperly loaded, the Railroad may set out such equipment at a location convenient to the Railroad and shall notify HTT by FAX of the location of the overloaded or improperly loaded equipment. HTT shall have 24 hours to remove excess weight or adjust load; or, if deemed safe, the Railroad will move the overloaded or improperly loaded equipment to nearest appropriate site. In any event, HTT shall be responsible for all costs for movement of the overloaded or improperly loaded equipment, and payment of any additional expenses incurred by the Railroad due to improper loading or overloading of equipment. The Railroad will move the affected equipment to Destination in such manner and time as is practicable after the Railroad receives notice from HTT that the problem has been corrected.

(c) UNLOADING OF EQUIPMENT AT DESTINATION: To ensure prompt disposition and unloading of equipment, except for provisions of Section 22, force majeure, if HTT fails for any reason to unload equipment at a designated delivery point within the free time referred to in the Schedules, after giving of notice of constructive placement at destination, The Railroad shall be authorized, at its election and at any time thereafter until the equipment is accepted at a designated delivery point not located on the Railroad's property, to return the loaded equipment to origin or to move it to an alternate destination. Any return movement or movement to an alternate destination shall be deemed to have been directed by HTT, and HTT shall be deemed to have selected any alternate destination and to have directed disposal of the Waste Products at any alternate disposal site. Any return movement shall be subject to the rate provided in the Schedules, in the reverse direction, as applicable for the specific Waste Product returning, and any movement to an alternate destination shall be made at applicable freight rates, at HTT's expense.

13. LOADING AND UNLOADING OF EQUIPMENT: HTT is responsible for loading and unloading equipment in a manner approved by the Railroad and subject to the Railroad's inspection.

14. SELECTION OF LANDFILL: HTT has selected the destination and disposal site for the shipments made hereunder and hereby certifies that the Railroad has not participated in, nor taken any active interest in, the site selection for the storage or disposal of the materials transported hereunder. The Railroad shall have no obligation with regard to disposition of Waste Products tendered to it for transportation other than to deliver it to HTT, or to an operator or other person designated or deemed to have been designated by HTT, at a destination site named in the Schedules attached to this Agreement or an alternate destination site designated or deemed to have been designated by HTT. HTT shall provide Railroad a copy of a contract with a

destination landfill or treatment site prior to shipping Waste Products to that landfill or treatment site.

15. COMMODITY AND ANALYSIS REPORTS: If requested, HTT shall provide the Railroad with a copy of a representative Waste Product analysis report that is required to be submitted to any federal, state or local agency or to the operator of any destination disposal sites.

16. INCIDENTS: In the event of an incident during transportation over the Railroads lines under this Agreement, which involves a release of the Waste Products, the Railroad shall immediately notify HTT, and each party shall take immediate action.

(a) In any such incident where the expenses of cleanup are the obligation of the Railroad under terms of this Agreement, HTT shall, upon request of the Railroad and to extent it is authorized by law and regulation:

(1) provide containers for loading of Waste Products and accept for disposal Waste Products being disposed of by the Railroad as a result of the cleanup ("Railroad's cleanup waste") subject to the parties mutual agreement on the cost of disposal for Railroad's cleanup waste to the extent the net tonnage of that waste exceeds the net tonnage of the original Waste Product.

(2) credit against the Railroad's disposal costs for the Railroad's cleanup waste any monies already collectible by HTT from other parties for the original disposal of the Waste Product involved in the incident.

(b) In any such incident where the expenses of cleanup are the obligation of HTT under the terms of this Agreement, the Railroad shall, upon request of HTT and to the extent it is authorized by law and regulation:

(1) transport the Waste Product being disposed of by HTT as a result of the cleanup ("HTT's cleanup waste")

(2) credit against HTT's transportation costs for HTT's cleanup waste any monies already payable by HTT to the Railroad for the original transportation of the Waste Product involved in the incident.

17. INDEPENDENT CONTRACTORS. The parties acknowledge and agree that nothing in this Agreement shall be construed as creating an employment or agency relationship between HTT and the Railroad. Neither party may hold out or represent to any third party that there exists any agency or employment relationship with the other nor may either party enter into any contract or agreement that may be binding upon the other. Each party shall be solely responsible for paying salaries, compensation, taxes and other costs incurred by it and shall defend, indemnify and hold the other party harmless for any loss or liability resulting from that party's failure to pay same.

18. FEDERAL, STATE, AND LOCAL LAWS AND PERMITS: HTT shall comply with all applicable federal, state, and local laws, ordinances, and regulations, including, but not limited to, all laws pertaining to the transportation, transfer, delivery, treatment, unloading, storage and disposal of these Waste Products. Prior to any transportation hereunder, HTT shall obtain any and all necessary permits or licenses for the transportation, transfer, delivery, treatment, unloading, storage or disposal of the Waste Products. If requested, HTT shall furnish copies of all applicable permits and licenses to the Railroad. HTT shall be responsible for compliance with all new or changed laws and regulations which apply to or affect the proposed operation, and shall immediately advise the Railroad of any new or changed law or regulations which may affect the Railroad's operation with respect to this Agreement. Failure of HTT to

comply with applicable laws and regulations as required above or failure to obtain and retain necessary permits or licenses shall serve as basis for CPR to forthwith terminate this Agreement without liability hereunder.

19. CLAIM SETTLEMENT AGREEMENT PROVISIONS. The parties will work together both to facilitate claims handling, and to reduce claims to an absolute minimum.

20. FORCE MAJEURE. In the event either party is unable to meet its obligations hereunder as a result of acts of god, war, insurrection, floods, strikes, derailments, or any like causes beyond its reasonable control, that party's obligations and those of such other party affected by such force majeure condition, will be suspended for the duration of same; provided however, that the parties will make all reasonable efforts to continue to meet their obligations during the duration of the force majeure condition; and provided further, that the party declaring force majeure conditions promptly notifies the other party of the event of force majeure (including its anticipated duration), the nature of the force majeure, and when it is terminated. The suspension of any obligation owing to force majeure will neither cause the term of this Agreement to be extended nor affect any rights accrued under this Agreement prior to the force majeure condition. In the event of a declaration of a Force Majeure the fees due under the License Agreement shall be reduced by a fraction the numerator of which is the number of days of the Force Majeure and the denominator of which is 365.

21. ASSIGNMENTS. HTT may not assign this Agreement, in whole or in part, without the prior written consent of the Railroad, which consent will not be unreasonably withheld or delayed. HTT may encumber its rights or interest in this Agreement for financing purposes as they relate to this transaction; provided that any holder of a security interest in this Agreement shall agree that any successor of HTT shall be a competent and qualified operator, is not a competitor of CPR and shall not be disqualified to do business with the City or State of New York for any reason other than citizenship. The parties acknowledge and agree that the Railroad shall not agree to any assignment which will deprive the Railroad of any commercial benefit or opportunity relating to the use or occupancy of the Oak Island Facility or which would deprive it of any revenue which it might otherwise enjoy relating to such use or occupancy over and above that which is set forth herein. Railroad shall have the right to assign this Agreement to any party purchasing the stock or substantially all the assets of the Railroad or should Railroad's right to use or occupy the Oak Island Facility terminate for any reason.

22. NO IMPLIED WAIVER. The failure of either party at any time to require performance by the other party of any provision of this Agreement will in no way affect the right to require such performance at any time thereafter, nor will the waiver of either party of a breach of any provision of this Agreement constitute a waiver of any succeeding breach of the same or any other provision.

23. **SEVERABILITY.** If any provision of this Agreement is found to be invalid or unenforceable, such invalidity or enforceability will not affect any other provision of the Agreement.

24. **ABANDONMENT.** Railroad will provide HTT not less than 30 days prior written notice of any intent to sell or abandon any rail line that is owned by it and utilized in connection with the routings, identified in this Agreement, providing such notice shall not trigger any right to terminate this Agreement unless a substantial portion of the routes necessary to perform transportation herein are sold or abandoned.

25. **CAPTIONS.** The captions of the Sections are inserted for convenience only and will in no way expand, restrict or modify any of the terms and provisions of any clause.

26. **MODIFICATION.** The parties agree that no change or modification to this Agreement will be of any force or effect unless it is incorporated in a written amendment executed by both parties.

27. **APPLICABLE LAW.** This Agreement will be governed and construed in accordance with the laws of the state of New York.

28. **ARBITRATION.** Except for disputes arising under Section 3 of this Agreement, any ~~Any~~ dispute arising under this agreement shall be submitted to binding arbitration before a single arbitrator provided by the American Arbitration Association (hereinafter "AAA") in New York, N.Y. 212-484-3266. No dispute as to a sum billed may be raised more than thirty days following the rendering of such bill. Any party seeking arbitration shall institute such arbitration by faxed letter to the other party with a copy by fax to the AAA c/o Steven Romano or successor at 212-307-4387 with a hard copy and a check for the applicable fee by Federal Express or other recognized overnight courier service to the AAA only. The AAA will provide a list of potential arbitrators by telefax within one business day of receipt of the fax copy of the notice of arbitration. The parties will agree on an arbitrator who is available, free of conflicts and willing to serve within three business days of the date of the AAA's fax. If the parties do not agree and give notice of their selection to AAA by the end of business on the thrid day the AAA will select the first name on the AAA provided he or she has no conflicts and is willing to so serve and is available to comply with the time schedule set forth herein. If the first person is not available the second person shall serve and so on. A hearing shall be scheduled to commence at a suitable neutral location to be provided by the party seeking arbitration in Newark, N.J. on the first business day of the week following the selection of the arbitrator. Unless the parties shall mutually agree otherwise, the hearing shall continue from day to day until completed. A decision shall be rendered within two business days of the close of the hearing. The party who's position is found to be in error by the arbitrator will pay the costs of the arbitration unless the arbitrator shall determine that a reasonable ground existed for the positions taken by both sides in which case the costs shall be equally shared. Should the dispute involve the amount of any payment for any service or for any right under this agreement the party disputing the amount shall pay the undisputed amount pending a decision of the arbitrator. The party rendering service or providing a right shall continue to render service or provide that right provided the undisputed amount is duly paid. A decision by the arbitrator shall be retroactive to the date the disputed sum was established, billed, published or determined which ever is earlier. Any sum then due will be paid within ten days of the receipt of the arbitrator's decision by telefax.

29. **NON-DISCLOSURE.** Each party will hold the details of this Agreement in confidence consistent with the manner in which it maintains confidentiality of its own similar proprietary information.

30. **NOTICE.** Any notice required or permitted to be given under this Agreement will be in writing and will be delivered in person, or sent by first-class mail and fax, addressed to the address of the other party set forth below or to such other address as such party will have communicated in writing to the other. Any such notice will be considered to have been given upon receipt at the office of the intended recipient.

Notices to HTT will be sent to:

Hi Tech Trans, LLC
843 Red Road
Teaneck, NJ 07666
Attn: Ronald A. Klempner

Notices to Railroad will be sent to:

Delaware and Hudson Railway Company, Inc.
Attn:.Director - Commercial
Windsor Station
910 Peel Street, Suite 300
Montreal, QC H3C3E4
Canada

Either party may provide changes in the above addresses to the other party by personal service or certified mail.

31. **CONTINGENCIES.** The parties acknowledge that the following contingencies may impact their ability to enter into this Agreement:

1. Obtaining permits required of the State of New Jersey, Essex County and the City of Newark for the construction, operation and transportation of waste Products or, in the alternative, reaching an accommodation with these agencies whereby such permits would be unnecessary.

2. Financing the construction and operation of the facility and purchase or lease of rolling stock by HTT.

3. Negotiation of an acceptable lease agreement by Railroad with Conrail.

4. Acknowledgment by Conrail that the operation of the facility by HTT represents a permitted use within the intermodal restriction contained in the Trackage Rights Agreement between Railroad and Conrail dated April 25, 1979.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

Hi Tech Trans, LLC.

By: _____
MANAGING PRINCIPAL

Delaware and Hudson Railway Company, Inc.

By: _____

SCHEDULE "A"

TRANSPORTATION TERMS

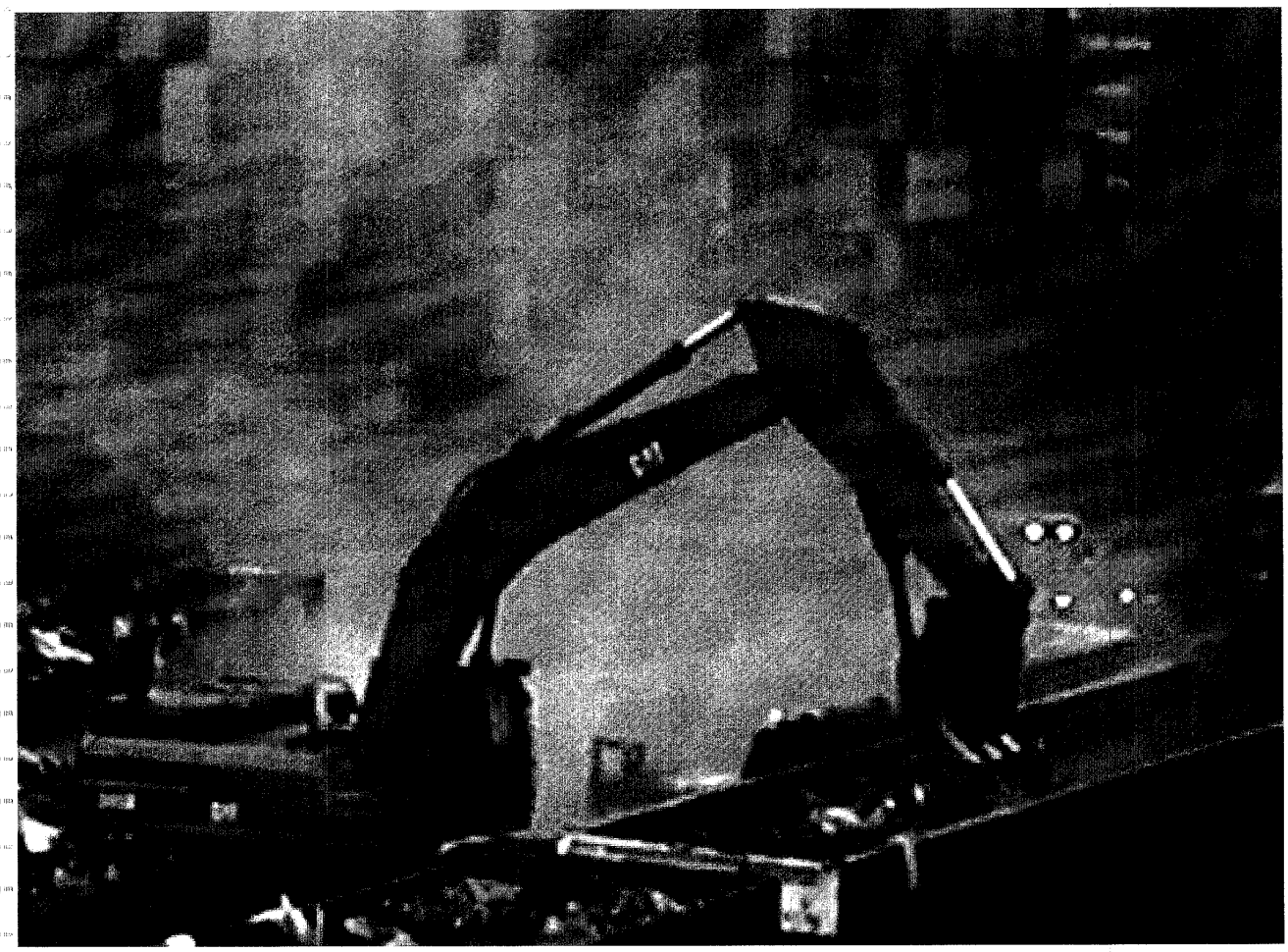
> Contract Number: CPRS OFFER-56116
> Effective Date: 2000-07-01 Expiry Date: see sublease
> Customer: HI-TECH TRANSPORTATION INC, Bill To
> Commodity: Waste Products STCC:4860000-4869999
> Origin: OAK ISLAND, NJ
> Route: CPRS DIRECT
> Equipment: PRICE APPLIES WHEN SHIPMENTS ARE LOADED IN GONDOLA CARS
> Weights: If present after a Weight Value, M = Weight X 1000.
> Rate Effective Date: 2000-07-01 Rate Expiry Date: see sublease
> Minimum Type: 01 Rate Unit: PER CAR
> Weight Unit: POUND
> Rate Weight: 100 TONS
> Item: 1, Deregulated

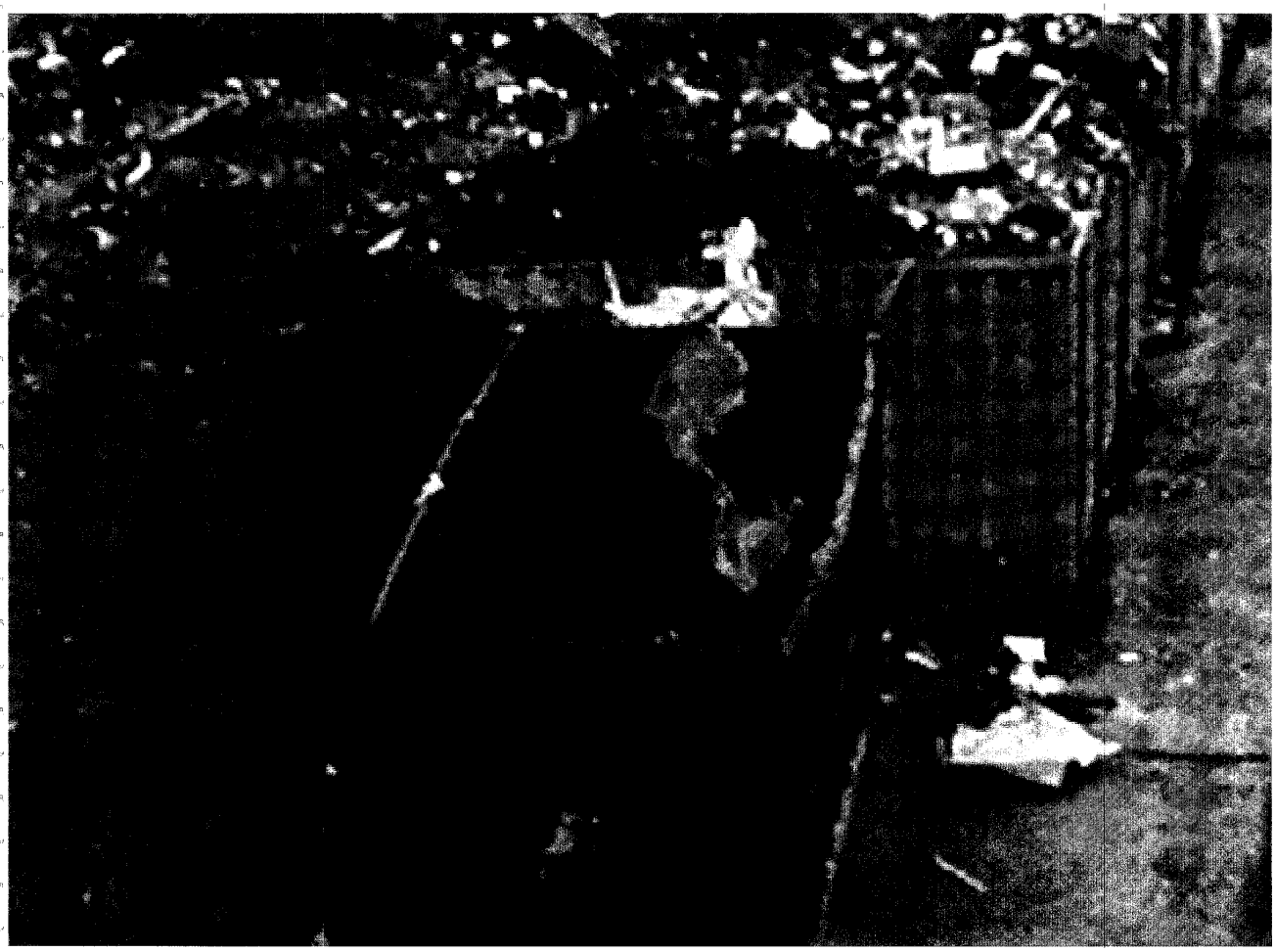
> Destinations	Ref#	Rate ($) Single Car	ten-29 cars	train of 30 to 100 cars
> BUFFALO, NY	(7,8)	$1,000	(12)	(12)
> NIAGARA FALLS, NY	(7,8,9)	$1,500	(12)	(12)
> CORNING, NY	*1	$800	(12)	(12)
Lowellsville, Ohio		$1,600	(12)	(12)
Canton, Ohio		$1,600	(12)	(12)
Scranton, Pa		$ 925	(12)	(12)

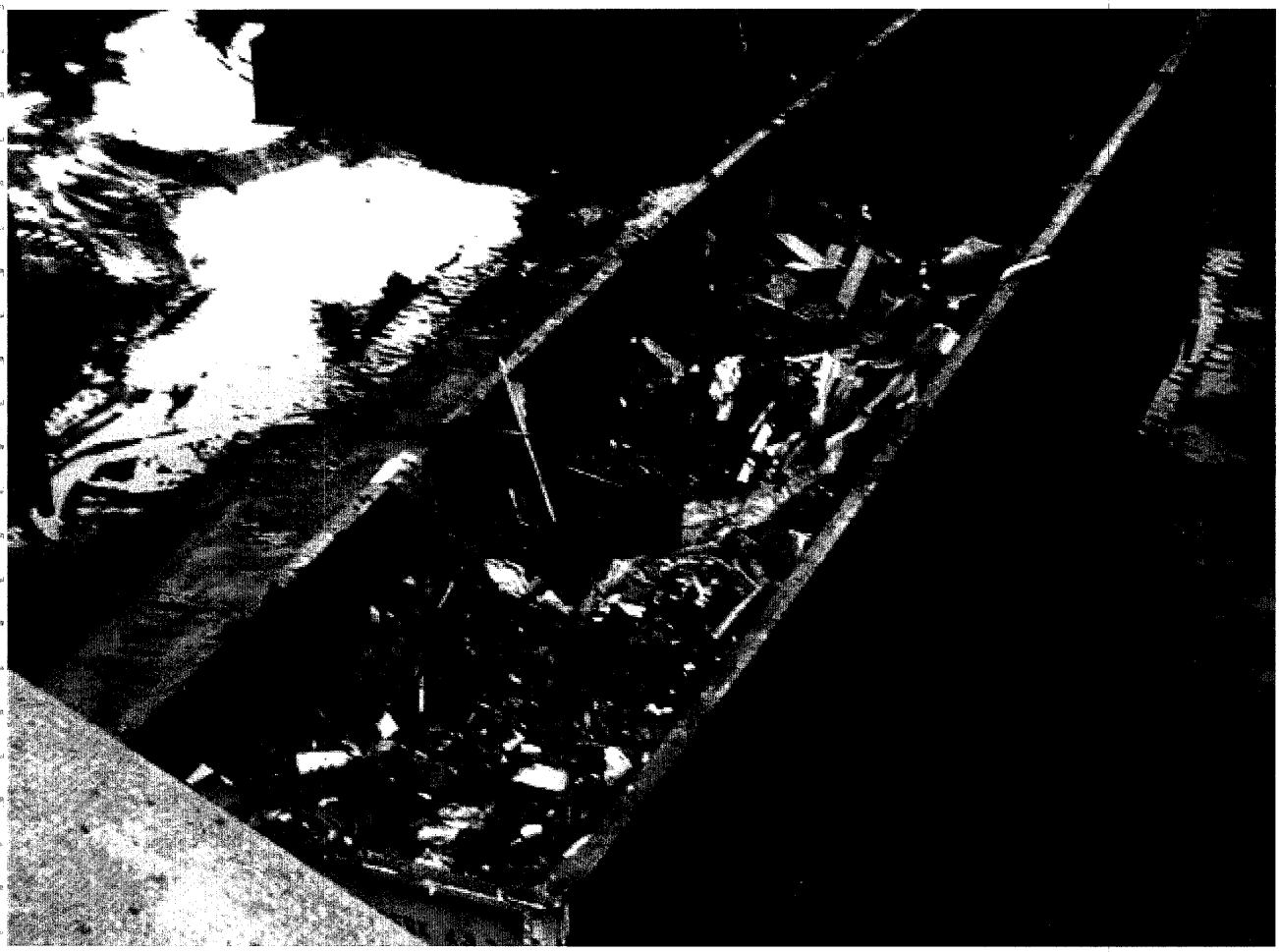
> Item Reference Mark(s): (1,2,3,4,5,6)
> Reference Numbers and Explanations:
> *1 SUBJECT TO REFERENCE MARKS (7,8,10,11)
> (1) PRICE IS STATED IN UNITED STATES FUNDS
> (2) RATE IS SUBJECT TO SHIPMENT IN HTT OWNED OR CONTROLLED EQUIPMENT
> (3) NO MILEAGE ALLOWANCE PAYMENTS WILL APPLY
> (4) PRICE WILL NOT APPLY ON SHIPMENTS ACCORDED STOP-OFF TO COMPLETE LOADING OR TO PARTIALLY UNLOAD
> (5) NO TRANSIT, DIVERSION OR RECONSIGNMENT PRIVILEGES SHALL APPLY UNDER THIS PUBLICATION WITHOUT THE PRIOR APPROVAL OF THE CARRIERS
> (6) PRICE APPLIES IN SHIPPR OWND-LSD EQUIPMENT
> (7) PRICE EXCLUDES DESTINATION CARTAGE AND TRANSFER

> (8) CUSTOMER AGREES TO SHIP AN ANNUAL MINIMUM VOLUME REQUIREMENT OF
> 0000000250 RAILCAR
> (9) PRICE INCLUDES CSX TRANSPORTATION SWITCHING CHARGE AT DESTINATION
> (10) PRICE INCLUDES NORFOLK SOUTHERN RAILWAY COMPANY (NORFOLK SOUTHERN)
SWITCHING CHARGE AT DESTINATION
> (11) PRICE APPLIES TO FINGER LAKES RAILWAY CORP SERVED INDUSTRIES AT DESTINATION
(12) DISCOUNTS TO APPLY AS APPROPRIATE TO FOR SHIPMENT BLOCKS OF 10 TO 29 CARS AND TRAINS OF 30 TO 100 CARS.

> Minimum Types and Explanations:
> 01 MINIMUM AS STATED







Certificate of Service

I hereby certify that a copy of the foregoing State of New Jersey, Department of Environmental Protection, **REPLY TO THE PETITIONS FOR DECLARATORY ORDER AND FOR EMERGENCY ORDER AND OTHER RELIEF** was served this 7th day of July 2003 via overnight carrier to those designated with an * and via USPS First Class Mail to the other persons on this service list:

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